June 14

REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF MONTANA,

FROM MARCH 21, 1898, TO DECEMBER 5, 1898.

BY

THOMAS C. BACH,

REPORTER.

VOLUME XXI.

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JUDGES

OF

The Supreme Court of the State of Montana,

DURING THE TIME OF THESE REPORTS.

HON. WILLIAM Y. PEMBERTON, Chief Justice.

HON. WILLIAM H. HUNT, } Associate Justices.
HON. WILLIAM T. PIGOTT, }

OFFICERS OF THE COURT.

C. B. NOLAN, Attorney General.

BENJAMIN WEBSTER, CLERK.

THOMAS C. BACH, REPORTER.

JUDGES AND JUDICIAL DISTRICTS.

The First Judicial District embraces the County of Lewis and Clarke; HENRY C. SMITH and S. H. MCINTIRE, Judges; residing at Helena.

The Second Judicial District embraces the County of Silver Bow; WILLIAM CLANCY and JOHN LINDSAY, JUDGES; residing at Butte.

The Third Judicial District embraces the Counties of Deer Lodge and Granite; *WELLING NAPTON, Judge; residing at Deer Lodge.

The Fourth Judicial District embraces the Counties of Missoula and Ravalli; FRANK H. WOODY, Judge; residing at Missoula.

The Fifth Judicial District embraces the Counties of Beaverhead, Jefferson and Madison; H. M. PARKER, Judge; residing at Boulder.

The Sixth Judicial District embraces the Counties of Park, Carbon and Sweet Grass; FRANK HENRY, Judge; residing at Livingston.

The Seventh Judicial District embraces the Counties of Yellowstone, Custer and Dawson; CHARLES H. LOUD, Judge; residing at Miles City.

The Eighth Judicial District embraces the County of Cascade; J. B. LESLIE, Judge; residing at Great Falls.

The Ninth Judicial District embraces the Counties of Gallatin, Broadwater and Meagher; FRANK K. ARMSTRONG, Judge; residing at Bozeman.

The Tenth Judicial District embraces the Counties of Choteau, Valley and Fergus; DUDLEY DU BOSE, Judge; residing at Fort Benton.

The Eleventh Judicial District embraces the Counties of Flathead and Teton; D. F. SMITH, Judge; residing at Kalispell.

*Appointed to succeed Hon. Theo. Brantley, who became Chief Justice of the Supreme Court January 3, 1889.

TABLE OF CASES REPORTED.

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(REFERENCE IS TO FIRST PAGE OF CASE.)

CONSTITUTION.

LAWS OF 1889.

COMP. STATUTES.
(First Div.)

COMP. STATUTES.
(Fifth Div.)

CODES OF 1895.

(Political Code.)

CIVIL CODE.

CODE OF CIVIL PROCEDURE.

PENAL CODE.

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

MARCH TERM, 1898.

PRESENT:

HON. WILLIAM Y. PEMBERTON, Chief Justice.

HON. WILLIAM H. HUNT, } Associate Justices. 21 1
HON. WILLIAM T. PIGOTT, } 122 525

A. C. BOTKIN, GUARDIAN, ETC., RESPONDENT. v. T. H. KLEINSCHMIDT ET AL., APPELLANTS.

[Submitted October 15, 1897. Decided March 21, 1898.]

Bond of Guardian—Liability of Sureties—Judgment Against Principal, Effect of.

1. BOND OF GUARDIAN—*Liability of Sureties.*—The defendants were sureties upon a bond given by a guardian in compliance with an order authorizing him to sell real estate belonging to his ward; the order was recited in the bond which contained the condition that the guardian would "faithfully execute the duties of the trust according to law," instead of the condition provided for in Section 387, Probate Act of the Compiled Statutes, 1887. *Held,* that upon a misappropriation of the funds realized from a sale of real estate upon the order, the sureties were liable therefor.

2. SAME—*Judgment Against Principal. Effect of.*—A judgment against a guardian declaring him to be indebted to the estate of his ward in a stated sum, being the moneys realized upon a sale of real estate made by him under an order of court, is binding upon the sureties on his bond given to secure the faithful performance by him of his trust.

3. SAME.—In an action against the sureties on a guardian's bond, they cannot attack such a judgment collaterally, or claim that the interest allowed in the judgment is incorrect.

Appeal from District Court, Lewis and Clarke County. H. R. Buck, Judge.

ACTION by A. C. Botkin, guardian of the person and estate of William Kohlweiss, against T. H. Kleinschmidt and others, on the bond of Henry C. Yaeger, former guardian. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Statement of the case by the justice delivering the opinion.

This is a suit on a guardian's bond. From the pleadings and record it appears that on July 3, 1889, Henry C. Yaeger was duly appointed and qualified as guardian of one Kohlweiss, an insane person. On September 9, 1889, the probate court of Lewis and Clarke county by proper order authorized Yaeger to sell certain real estate belonging to said insane ward. In pursuance of said order of sale, Yaeger executed the bond required by law in such cases, with defendants Kleinschmidt and Parchen as sureties thereon, in the sum of $10,000.

The condition in said bond is as follows: "That whereas, by an order of the Probate Court of the said County of Lewis and Clarke, Territory of Montana, duly made and entered on the 9th day of September, 1889, the above-bounden Henry C. Yaeger was authorized to sell lot No. 20, in block No. 26, property of said insane person, upon executing a bond according to law, in said sum of ten thousand dollars: Now, therefore if the said Henry C. Yaeger, as such guardian, shall faithfully execute the duties of the trust according to law, then this obligation to be void; otherwise, to remain in full force and effect."

On October 22, 1889, Yaeger sold the real estate mentioned for the sum of $3,500. On March 9, 1893, his letters as

guardian were revoked, and the plaintiff herein was appointed and qualified as his successor. On December 2, 1895, the District Court of said county settled and adjudicated the account of said Yaeger as guardian of said estate, and duly adjudged the said Yaeger to be indebted to said estate in the sum of $4,595, being the amount for which the real estate was sold and the interest thereon, less some items of commission and costs, and ordered the said Yaeger to pay the same immediately to plaintiff, which the said Yaeger has failed to do. The defendants interposed a demurrer to the complaint in this action upon the grounds: (1) That the same did not state facts sufficient to constitute a cause of action; (2) that, while an embezzlement is alleged as of the date when the moneys were received, other facts alleged in the complaint show that it would have been an impossibility that there could have been an embezzlement at that time, because it appears that the moneys came lawfully into Yaeger's possession, and that he was not required by law to keep the cash received in kind, but only to stand ready to turn over when lawfully ordered by the court so to do, and that there was, therefore, in law, no embezzlement until the court had made an order requiring the guardian to pay the moneys over to some person, and which order he had refused to obey; (3) because there has been no judgment or order of the court fixing the liability of the principal, and until this has taken place no right of action exists against the sureties.

The demurrer was overruled. The defendants Parchen and Kleinschmidt then answered, denying the embezzlement, or that they assumed any obligations as to real estate proceeds, or that any judgment of debt was entered against Yaeger.

Upon the trial the defendants made special objections to the proofs upon the same grounds presented by their demurrer and answer. The proofs offered on the part of plaintiff were the records showing the order removing Yaeger as guardian of the estate, as shown above, and appointing plaintiff his successor, and the judgment, wherein the court adjudged Yaeger to be indebted to the estate in the amount as given above.

Thereupon the appellants moved for a nonsuit, which was overruled, and, they making no further defense, judgment was entered against them for the sum of $4,595, with interest and costs. From this judgment, defendants appeal.

Toole & Wallace, for Appellants.

A. C. Botkin, *T. J. Walsh* and *C. B. Nolan*, for Respondent.

PEMBERTON, C. J.—Counsel for appellants contend that, as the conditions of the bond sued on are not the conditions prescribed by Section 387, page 370, of the Compiled Statutes of 1887, but are conditions prescribed by Section 358, page 363, same statute, they cannot be held liable in this action.

Section 358 refers to the general duties and obligations of guardians, and the conditions of the bonds they are required to execute when they take charge of the estates of their wards.

Section 387 has reference to bonds which guardians are required to give before selling real estate of their wards under order of the court, and is as follows: "Every guardian, authorized to sell real estate, must, before the sale, give bond to the probate judge, with sufficient surety, to be approved by him, with conditions to sell the same in the manner, and to account for the proceeds of the sale, as provided for in this chapter and Chapter VII of this title."

Counsel for appellants contend that this is a special statute, governing the execution and prescribing the conditions required in bonds before real estate of the ward can be sold by the guardian under order of the court, and that, as the conditions named in the bond in suit are not in conformity with the requirements of this section, but are such as are prescribed in said Section 358, the appellants are not liable on the bond.

It will be observed that this section (387) does not prescribe any special conditions. The conditions are that the guardian will "sell the same in the manner, and to account for the pro-

ceeds of the sale, as provided for in this chapter and Chapter VII of this title.'' So it will be seen that the manner of the sale of real estate, and how the proceeds thereof shall be accounted for, are not prescribed in Section 387, but by this section the manner of sale and how the proceeds shall be accounted for by the guardian are such as are prescribed in the two chapters named. So that all the provisions of these two chapters, referring to the manner of sale of real estate and the accounting for the proceeds, entered into the bond executed under Section 387 as much as if they had been directly referred to, or written word for word therein as conditions. And, besides, both the sections involved here are included in the same chapter. The conditions of the bond refer to the order of the court authorizing the guardian to sell the real estate. A trust was thereby confided to the guardian. These appellants obligated themselves as his sureties that he would faithfully perform the trust mentioned in the bond. A literal interpretation of the bond requires that they should stand good for its performance. A construction of the statutes that would relieve them of their plain liability would be, in our judgment, as unauthorized as unjust.

Counsel have cited authorities to the effect that sureties on the general bond of a guardian are not liable for the proceeds of the sale of real estate made by the guardian under order of the court; that the sureties on the special bond required to be given in such cases are alone liable. But these cases are not applicable. This is a case involving the liability on the special bond,—not the bond given for the general administration of the ward's estate. (*Withers* v. *Hickman*, 6 B. Mon. 292; *Powell* v. *Powell*, 48 Cal. 234; Woerner on Am. Law of Guardianship, page 134.)

Counsel for the appellants insist that the judgment of the District Court against Yaeger as guardian, whereby the status of his account was determined and he adjudged to be indebted to the estate in the amount sued for and ordered to pay over the same immediately to his successor, was rendered without notice to the sureties, and that they are, therefore, not bound thereby.

Woerner says: "It is the undertaking of the surety on a guardian's bond that his principal shall discharge all his official duties; and, since one of the duties of the guardian is to pay the amount found to be due by him to the ward by a court having jurisdiction for such purpose, it follows that the judgment to that effect must be binding upon the surety, unless obtained by fraud or mistake. Hence, it is held to be a well-settled principle that the sureties in a guardian's bond are *prima facie* bound by a recovery against their principal, although they were not parties to the suit, and that they can relieve themselves only by showing that the amount recovered was in excess of the amount to which plaintiff was entitled, or that he was not entitled to recover at all." (Woerner on Am. Law of Guardianship, page 149. See, also, Brandt on Suretyship and Guaranty, § 580.)

In *Brodrib* v. *Brodrib*, 56 Cal. 563, it is held that a judgment against the guardian in such cases is conclusive, not only against him, but against his sureties also. (*Chaquette* v. *Ortet*, 60 Cal. 594; *Biggins* v. *Raisch*, 107 Cal. 210, 40 Pac. 333; *Deobold* v. *Opperman* 19 N. E. (N. Y.) 94.)

We think by the great weight of authority the sureties in this case are bound by the judgment against their principal, notwithstanding they were not parties to the suit.

It is also claimed by appellants that judgment was rendered against Yaeger for too much interest by the District Court. This matter cannot be inquired into now. The judgment of the District Court is conclusive in this action. If the judgment was rendered for too great a sum, the parties aggrieved should have sought their remedy in the District Court, and, failing there, should have appealed. No remedy is obtainable in this collateral action.

We are of the opinion the judgment should be affirmed, and it is so ordered.

Affirmed.

HUNT and PIGOTT, JJ., concur.

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24	512
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s25	368
s25	380
21	7
27	244

CALVIN BEACH ET AL., APPELLANTS, *v.* SPOKANE RANCH & WATER COMPANY, RESPONDENT.

Appealable Order—New Trials.

1. APPEALABLE ORDER.—An order made after judgment and which extends the time for filing a bill of exceptions, is an appealable order, under Section 1722, Code of Civil Procedure, which authorizes an appeal from any special order made after final judgment.
2. SAME.—The general rule that, when an appeal can be taken from an order, an order refusing a motion to modify the former order is not appealable, does not apply when the original order was irregularly issued, or was made without notice.
3. SAME.—An order refusing to modify a prior order is a decision upon a matter of law to which an exception may be taken.
4. NEW TRIAL.—An issue of fact upon which a new trial can be granted is such an issue only as is raised by the pleadings; a statement on motion for new trial is confined to such issues; and a new trial of a motion is not authorized by the code. (§§ 682, 1030 and 1170, Code of Civil Procedure, construed.)

Appeal from District Court, Lewis and Clarke County. Henry C. Smith, Judge.

ACTION by Calvin Beach, by his guardian, E. Beach and others, against the Spokane Ranch & Water Company. From a judgment for defendant, plaintiffs appeal. Motion to dismiss appeal denied.

McConnell & McConnell, for Appellants.

Sanders & Sanders, for Respondent.

PIGOTT, J.—Motion to dismiss appeal. Judgment was entered against defendant on July 3, 1897. On October 11, 1897, the court made the following order, which was entered on the minutes: "On motion of counsel for defendant, and by consent of plaintiffs, court this day granted thirty days' additional time to defendant in which to prepare, serve, and file statement on motion for new trial and bill of exceptions herein." December 28, 1897, plaintiffs moved the court to correct the order of October 11th by striking out the words, "and by consent of plaintiffs." Upon the hearing of the motion, plaintiffs claimed that the order was irregular, and was

made without their knowledge or consent. The motion was denied. Evidence adduced upon the hearing is brought here by bill of exception taken to the order denying the motion. Defendant moves to dismiss the appeal upon three grounds:

1. It is urged that the order is not appealable. Subdivision 2 of Section 1722 of the Code of Civil Procedure, authorizes appeal from any special order made after final judgment. Upon authority of *Clarke* v. *Gonu*, 2 Mont. 538; *Mining Co.* v. *Weinstein*, 7 Mont. 346, 17 Pac. 108; *Calderwood* v. *Peyser*, 42 Cal. 110; *Clark* v. *Crane*, 57 Cal. 629; and *Empire Gold Mining Co.* v. *Bonanza Gold Mining Co.* 67 Cal. 406, 7 Pac. 810,—and for the reasons there assigned, we hold that the order is appealable. See, also, Hayne, New Trial and Appeal, § 196. It is also insisted that, if the order of October 11th is subject to appeal, the subsequent order denying a motion to correct or modify it is not appealable. The general rule is that when an appeal can be taken from an order, a subsequent order, denying a motion to change the first order, is not appealable. But we are of opinion that it does not apply when the original order was irregularly issued, or was made *ex parte*, and without notice. The principle of this exception to the rule was recognized in *Mayor, etc., of the City of San Jose* v. *Fulton*, 45 Cal. 316, and is approved in Hayne, New Trial and Appeal, § 19, subdivision 4. In the case at bar there is a controversy in respect of the order of October 11th, plaintiffs insisting that it was made without their knowledge or consent, and irregularly, while defendant contends to the contrary. We think this is sufficient to establish *prima facie* the appealable character of the subsequent order.

2. The second reason stated as a ground for dismissing the appeal is "that there is no bill of exceptions herein, for the reason that the objection is made upon a matter of fact, and an exception does not lie thereto." Even if this were true, it would not require a dismissal. But the exception is to the decision of the court denying the motion to change the order of October 11th, and is, therefore, clearly to a matter of law,

within the meaning of Section 1150 of the Code of Civil Procedure.

3. The last ground is that there is no statement on motion for a new trial. This is no reason for dismissing the appeal. An issue of fact arises upon the pleadings. (§ 1030, Code of Civil Procedure.) The only pleadings allowed are named in Section 662. Motions are not among them. A new trial is a re-examination of an issue of fact in the same court after a trial and decision. (§ 1170.) It is clear that the issue of fact mentioned in Section 1170 is that defined by section 1030 as arising upon the pleadings. There is no statute permitting the new trial of a motion. (See *Harper* v. *Hildreth*, 99 Cal. 265, 33 Pac. 1103.) The motion to dismiss the appeal is denied.

PEMBERTON, C. J., and HUNT, J., concur.

ROBERT E. HAMILTON, APPELLANT, *v.* E. A. HUSON ET AL., RESPONDENTS.

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(Submitted February 25, 1898. Decided March 21, 1898.)

Mining Claim—Trespass—Pleading—Denial—Waiver.

1. MINING CLAIM—*Trespass.*—In an action for trespass for cutting timber upon placer mining ground, plaintiff based his claim of ownership upon actual possession, and not by virtue of a location under the laws of the United States; defendants had not cut any timber from any portion of the claim actually occupied by plaintiff. *Held,* that a motion for non-suit was properly granted.
2. PLEADING—*Denial—Waiver.*—The answer denied "every material allegation in the complaint." *Held,* that plaintiff not having objected at the trial, could not upon appeal question the sufficiency of the answer.

Appeal from District Court, Fergus County. Dudley Du Bose, Judge.

ACTION by Robert E. Hamilton against E. A. Huson and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Frank E. Smith and *C. B. Nolan*, for Appellant.

Carpenter & Carpenter, *Walsh & Newman* and *Rudolph Von Tobel*, for Respondents.

PEMBERTON, C. J.—Plaintiff alleges in his complaint that he is the owner, in possession, and entitled to the possession, of three certain placer mining claims in Fergus county. He alleges that in February, 1897, the defendants wrongfully entered upon these mining claims, and cut down a large amount of timber and trees growing thereon; that they are removing the same, and threaten to continue to cut down and carry away the timber. Plaintiff asks for damages, and for a perpetual injunction restraining the defendants from cutting down and removing the timber.

The answer denies the allegations of the complaint as to the ownership and possession of the mining claims in controversy, as well as the allegations as to damages and sets up affirmatively that defendant Huson is the sole owner of the premises in dispute. Defendant Maloy disclaims any interest in the ground, and alleges he was an employe of defendant Huson.

By stipulation, the allegations of new matter contained in the answer are denied.

At the close of plaintiff's evidence, the defendants filed the following motion for a nonsuit: "Defendants move at this time for a nonsuit on the following grounds, to-wit:

"First, that the evidence does not show any title or right of possession in the plaintiff.

"Second, that the evidence does not show any actual possession by the plaintiff of the premises described in the complaint or any part thereof.

"Third, that the evidence does not show any damage to the plaintiff.

"Fourth, that the evidence does not show that the defendants, or either of them, or their agents, were guilty of any trespass upon the premises described in the complaint, or any of them, either by cutting trees or otherwise; that the evi-

dence does not show that the damage, if any, resulting from the cutting of the timber, would be irreparable; that the evidence does not show that the plaintiff, or his grantors, are citizens of the United States, or have declared their intention to become such."

This motion was granted by the court. Judgment was rendered for defendants for costs. From this judgment, and an order overruling a motion for a new trial, this appeal is prosecuted.

As disclosed by the record, plaintiff claimed to own, and be entitled to the possession of, the mining claims in question, as the purchaser thereof from the Buchanan Brothers and one Brooks, who, it is contended, located the claims in the year 1881. It is also contended that the Buchanans relocated the mining claims in 1888. The relocation notice is in the record. It is defective, in that it is not sworn to by any one. After the introduction in evidence of the certified copy of the deed from the Buchanans and of the relocation notice, plaintiff discovered that the notice of relocation of the claims was invalid; and thereupon abandoned his claim to a right of recovery, on the ground of title or right of possession to the ground, by reason of any valid location of the mining claims having ever been made, and sought to recover solely on the ground of actual possession. So that we are not called upon to determine any question as to the location of the mining claims or the validity of any notice of location. These questions are all eliminated from the case by the plaintiff's voluntary abandonment of them on the trial.

Did the plaintiff, then, have any such possession of the mining ground in controversy as would enable him to recover in this case? The ground in controversy is mining ground, and this case must be determined by the law in relation to such land.

In *Belk* v. *Meagher*, 104 U. S. 284, it is said: "The right of possession comes only from a valid location. Consequently, if there is no location, there can be no possession under it."

In *Garfield Mining and Milling Co.* v. *Hammer*, 6 Mont.

53, 8 Pac. 155, this court said: "Therefore, when the respondent's claim of ownership and right to the possession were put in issue by the answer, it devolved upon the respondent to show affirmatively upon the trial that it had complied fully with all the requirements of the act of congress and the local rules and regulations relative to the location of mining claims; that is, that it had made a valid location."

In *McKay* v. *McDougal*, 19 Mont. 488, 48 Pac. 988, this court said: "When it comes to establishing the fact of ownership, if at issue, then plaintiff must support his pleading by claim from a paramount source of title, or by evidence of compliance with the mining laws of the United States and of the state."

In this case there is no pretense of a valid or any other kind of location of the mining claims in dispute; hence there could be no such possession as would enable plaintiff to recover.

Even if it be conceded that plaintiff was entitled to the possession of that part of the mineral land in question which he actually occupied and was mining, still there is no evidence that the defendants cut any timber or trees thereon, for the evidence shows that the defendants cut no timber at a point nearer than from 800 to 1,500 feet from the ground actually occupied by plaintiff. The mining ground the plaintiff claims to be in the actual possession of runs up the creek for more than one mile and a half, and is from 100 feet to 20 rods wide. It makes all the crooks and turns of the stream. The plaintiff claims to be mining, and is in actual possession of, only a small portion of this remarkable strip of ground, near the end thereof furthest down the creek. It is ridiculous to say that he is in actual possession of all this strip of land, or that by virtue of such possession, he has a right of action for damages against a party who cuts timber thereon 800 or 1,500 feet away from the portion in his actual possession.

Counsel for appellant say the authorities hold "that if a person having possession of a part of a claim not properly located makes a transfer of the property by deed, describing the same by metes and bounds, to a grantee, and the grantee

claims by virtue of such transfer, this would give constructive possession to the whole tract as against a mere intruder,'' and cite authorities in support of this position. But in the case at bar the plaintiff is not claiming under a deed from a grantee who claims under any sort of a location. Plaintiff abandoned on the trial of the case all pretended title under the deed from the Buchanans, and all right to the possession of the mining claims by virtue of any location or compliance with the mining laws. He claims by virtue of actual possession alone. There is not a particle of evidence in the case showing, or tending to show, that the defendant ever intruded upon, or cut down and removed, any timber from any ground of which the plaintiff had actual possession. We think the evidence of plaintiff, taken as a whole, did not show or tend to show that he was entitled to any judgment or relief against the defendants.

Counsel for appellant contend that the denial in the answer ''of every material allegation in the complaint is not sufficient,'' and that plaintiff is entitled to judgment on the pleadings. In the court below, the parties treated the denial as good and sufficient, and the case was tried on that understanding. This question cannot be raised now, the parties having treated the pleadings as sufficient in the court below.

The judgment and order appealed from are affirmed.

Affirmed.

HUNT and PIGOTT, JJ., concur.

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GAFFNEY MERCANTILE COMPANY, APPELLANT, *v.* CHARLES HOPKINS, RESPONDENT.

[Submitted March 4, 1898. Decided March 21, 1898.]

Contract—Reformation of.

In an action to reform a contract by the terms of which a plaintiff had agreed to pay to the defendant the amount which should be found due to him from one "C," the complaint alleged that the contract was made with the mutual understanding that plaint-

iff was not the guarantor for the payment of any indebtedness which might so be found to be due, and that he was not to pay any sum in excess of his indebtedness to "C;" the complaint did not allege any mistake, mutual or unilateral, in the making of the contract, or any mistake or inadvertence made in reducing its terms to writing. *Held*, that the complaint did not state facts sufficient to constitute a cause of action.

Appeal from District Court, Jefferson County. M. H. Parker, Judge.

ACTION by the Gaffney Mercantile Company against Charles Hopkins to reform a contract. Defendant demurred to the complaint, and his demurrer was sustained. Plaintiff appeals. Affirmed.

Geo. F. Cowan, for Appellant.

Wm. H. De Witt, for Respondent.

PIGOTT, J.—The Gaffney Mercantile Company brought this action to reform a certain written contract made between it and Charles Hopkins, and to enjoin him from prosecuting an action commenced by him against it upon the contract. Defendant demurred to the complaint for insufficiency. The court sustained the demurrer, and plaintiff electing to stand upon the complaint, judgment passed for the defendant, from which the plaintiff appeals. Pending the appeal, this court, as authorized by Section 23, Code of Civil Procedure, granted the injunction prayed by the plaintiff.

The single question presented is whether the complaint states facts sufficient to constitute a cause of action. It sets out that on July 19, 1897, plaintiff and defendant entered into a stipulation in writing, with respect to a certain suit entitled "*Chas. Hopkins* v. *H. Chambers and the Gaffney Mercantile Company*," then pending and set for trial on that day, by the terms of which the case was to be continued, and a referee appointed to hear the evidence and find the amount due from Chambers to Hopkins, and that judgment for the amount so found should be entered against Chambers, "which said judgment, in consideration of this stipulation, and in consideration of the further fact that there are now and there will be

moneys in the hands of the said Gaffney Mercantile Company due to the said Chambers, the said Gaffney Mercantile Company agrees to pay said judgment within thirty days after the entry of said judgment." The complaint further charged that "the said stipulation was so then and there made and entered into by the parties thereto, upon the mutual understanding between said parties that this plaintiff was not the guarantor for the payment of any indebtedness then existing, or that might be found existing, from said H. Chambers to said Charles Hopkins upon an accounting and reference in said stipulation provided for, and that the same was wholly based, for its consideration, upon the theory that this plaintiff would have sufficient moneys in its hands belonging to said Chambers out of which any judgment that might be recovered in said action by Hopkins against Chambers could be paid, and that the stipulation was not made with any purpose or intent on the part of either of the parties thereto, or with any understanding or agreement between any of said parties, that the plaintiff should be bound thereby to any greater extent than the sum of money (not exceeding the amount of said judgment) which was then expected to be left in plaintiff's hands belonging to said Chambers, after balancing the account between the plaintiff and Chambers; that the agreements and understanding between the parties to said stipulation, both before and after the execution of the same, were that this plaintiff was only bound thereby to the extent of moneys in its hands belonging to said Chambers;" that in the action of Hopkins against Chambers and the Gaffney Mercantile Company the referee found $491.81 to be due from Chambers to Hopkins, for which sum judgment was entered, in accordance with the stipulation; that the mutual accounts between the plaintiff and Chambers had been balanced, disclosing an indebtedness from Chambers to the plaintiff instead of from the plaintiff to Chambers; that on October 7, 1897, defendant commenced an action against the plaintiff to recover said sum of $491.81 for the breach by the plaintiff of its promise contained in the stipulation to pay the

defendant the amount of the judgment rendered against Chambers in the action of Hopkins against Chambers and the plaintiff.

The complaint does not set up the facts necessary to entitle the plaintiff to a reformation. "Reformation is appropriate when an agreement has been made, or a transaction has been entered into or determined upon, as intended by all the parties interested; but in reducing such agreement or transaction to writing, either through the mistake common to both parties, or through the mistake of the plaintiff, accompanied by the fraudulent knowledge and procurement of the defendant, the written instrument fails to express the real agreement or transaction." (Pomeroy on Equity Jurisprudence, § 870.)

Section 3132 of the Code of Civil Procedure, which merely declares the common-law rule, is as follows: "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms and, therefore, there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases: (1) Where a mistake or imperfection of the writing is put in issue by the pleadings. * * *"

Section 4430 of the Civil Code, affirmative of an equity doctrine, reads: "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done, without prejudice to rights acquired by third persons, in good faith and for value."

The mistake or imperfection must be pleaded. (§ 3132, *supra*, *Gamble* v. *Knott*, 40 Ga. 199; *McMinn* v. *Patton*, 92 N. Car. 371; *Anderson* v. *Logan*, 105 N. Car. 266, 11 S. E. 361.) Neither directly nor by inference does the complaint allege any mistake, mutual or unilateral, in the making of the contract, nor a mistake or inadvertence in its reduction to the

form of a written stipulation. True, the plaintiff avers that the stipulation was made upon the mutual understanding and with the intention that the plaintiff should not be liable to the extent expressed by the stipulation; but this, without more, is but an averment that the parties understood and intended that the contract should mean something different from that which it expressed. Upon well-established principles, parties themselves may not so alter the terms of a written contract. (*Brintnall* v. *Briggs* (Iowa) 54 N. W. 530. See, also, *Fisher* v. *Briscoe*, 10 Mont. 124, 25 Pac. 30, and *Anderson* v. *Perkins*, 10 Mont. 154, 25 Pac. 92.) Nor will the courts do for them that which they could not themselves accomplish. From the allegations of the complaint it is manifest that the plaintiff does not contend for the reformation of the written contract on the ground of fraud, accident, or mistake, but seeks to reform such contract, complete upon its face, and the terms of which were understood and assented to by the plaintiff at the time it was made, upon the ground that the parties understood and intended to interpret it in a sense contrary to that expressed by its language. This may not be done. (*Brintnall* v. *Briggs*, and section 3132, *supra*.)

The allegation concerning the understanding between the parties, subsequent to the execution of the stipulation, as to its import, in no wise remedies the defect pointed out. It falls, moreover, within the inhibition of section 2281 of the Civil Code, providing that "a contract in writing may be altered by a contract in writing or by an executed oral agreement, but not otherwise."

Defendant suggests that the complaint is in other particulars defective; but, since the reason we have assigned is sufficient to sustain the court below, they will not be considered. The judgment is affirmed, and the injunction issued by this court is dissolved, with costs.

Affirmed.

PEMBERTON, C. J., and HUNT, J. concur.

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GEORGE F. COPE, CASHIER, RESPONDENT, v. MINNESOTA TYPE FOUNDRY CO. ET AL., RESPONDENTS.

[Submitted March 22, 1898. Decided March 28, 1898.

In order to renew a chattel mortgage, it is not necessary to state in the affidavit (provided for in Section 1542, Fifth Division of the Compiled Statutes) that the mortgage is extended; it is sufficient, in that respect, if the affidavit states the amount of the debt justly owing at the time of filing the affidavits and the time to which the payment of the debt is extended.

Appeal from District Court, Lewis and Clarke County. Henry C. Smith, Judge.

ACTION by George F. Cope, cashier, against the Minnesota Type Foundry Company and others. Judgment for plaintiff. Some of the defendants appeal. Affirmed.

Statement of the case by the justice delivering the opinion.

The nature and history of this case are fully stated in the former report thereof. (20 Mont. 67, 49 Pac. 387.) The action was originally brought by George F. Cope, cashier, against the defendants, the Minnesota Type Foundry Company, J. Henry Jurgens and Lucien Eaves. A demurrer to the amended answer of defendants Jurgens and the Minnesota Type Foundry Company was sustained. Plaintiff's motion for judgment on the pleadings was granted, and defendants appealed. The action of the District Court was reversed (1) because of the omission of the plaintiff's complaint to properly aver that the chattel mortgage involved in the suit was filed for record, and (2) because it was not properly pleaded that said mortgage had been extended to the 22nd of June, 1896.

The case was again proceeded with before the District Court, where plaintiff filed an amended complaint, in which he averred that the chattel mortgage described in the complaint was filed for record, and that for the purpose of renewing said mortgage, under the provisions of Section 1542, Fifth Division of the Compiled Statutes, 1887, the debt being

wholly unpaid, plaintiff filed in the office of the clerk and recorder a certain affidavit, showing "the date of said mortgage, the names of the mortgagor and mortgagee therein, the date of filing the same, the amount of the debt secured thereby, the amount of said debt justly owing at the time of filing said affidavit, the time to which the same is extended, and that such debt was not made nor renewed nor extended to hinder, delay, or defraud creditors or subsequent mortgagees of said mortgagor," etc.

To this amended complaint, defendants the Minnesota Type Foundry Company and Jurgens answered, by pleading the affidavit under which plaintiff alleged he had renewed the mortgage, and denying that, by reason of the facts alleged, the mortgage was renewed or continued for any length of time, or at all.

Plaintiff was granted a judgment on the pleadings. The type foundry company and Jurgens have appealed.

Clayberg, Corbett & Gunn, for Appellants.

It is very clear from the provisions of Sections 1541, 1542 and 1543 that a chattel mortgage may be renewed or extended, without extending the time for the maturity of the debt secured thereby, and that an extension of the time of payment of the indebtedness does not operate to renew or extend the mortgage. As an extension of the time of payment of the indebtedness does not renew or extend the mortgage and a renewal of the mortgage does not extend the time of payment of the indebtedness no reason can exist for stating in the affidavit for renewal the time to which the payment of the indebtedness is extended. The extension of the time for the payment of the indebtedness secured by a chattel mortgage is a matter that does not concern third parties, and can be arranged by agreement between the mortgagee and mortgagor without making a record of such agreement, as shown by Section 1543. The extension of the mortgage, however, is a matter which clearly affects third parties, and it is for this reason

that the law has wisely provided that a notice of the period of such extension or renewal must be given by requiring the affidavit to be filed. Statutes relating to the renewal of chattel mortgages must be strictly construed. (Cobbey on Chattel Mortgages, § 591.) This court has, by a uniform line of decisions, held that the failure to strictly comply with the provisions of the chattel mortgage law with reference to the affidavit to be attached to a chattel mortgage, renders the mortgage void. (*Milburn Manufacturing Co.* v. *Johnson*, 9 Mont. 537; *Baker* v. *Power*, 7 Mont. 326; *Marcum* v. *Coleman*, 10 Mont. 73; *Leopold* v. *Silverman*, 7 Mont. 266; *Butte Hardware Co.* v. *Sullivan*, 7 Mont. 307; *Cope* v. *Type Foundry Co.*, 49 Pac. 387.)

Wm. Wallace, Jr., Attorney for Respondent.

The act speaks of renewing the mortgage by doing certain things; these things done—the effect is to renew the mortgage. The things to be done involve statements to be made in the affidavit; the object of those statements was to inform creditors and other persons of the amount of the mortgage debt. The principal object of the statute is to give notice to all persons interested at intervals of two years of the amount of the mortgage debt. (*Rice* v. *Kahn*, 35 N. W. 465, 467.) The mortgage is a mere incident to the debt; the assignment of the latter carries the former with it, though the former be not named. (Jones on Mortgages, § 817 and notes; § 3825 of the Civil Code and cases cited.) For this reason, in the satisfaction of a chattel mortgage, you simply state that the debt is paid, or the conditions fulfilled, or the obligation discharged, not that the mortgage is satisfied, which is a legal conclusion flowing from the stated facts. (§ 712, Fifth Division of the Compiled Statutes; § 933 of the Civil Code; § 1552, Fifth Division of the Compiled Statutes; § 3874 of the Civil Code.) Just as here the mortgage is renewed by giving essential information under oath as to the mortgage debt. Counsel cites Montana decisions holding these statutes in derogation of the

common law, and therefore to be strictly construed. These statutes are continued in the new code. The code itself expressly declares the rule of interpretation as follows: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice." (§ 4652 of the Civil Code; Cobbey on Chattel Mortgages, § 593; *Manwaring* v. *Jennison*, 61 Mich. 120 foot, 140 foot; (27 N. W. 899). It is admitted that the purpose of the plaintiff in filing the document was to comply with this section. He designed doing nothing else. The object of the act is fully accomplished by the affidavit filed. For, as we have seen, the purpose of the act was to furnish information as to the condition of the mortgage debt, and it is held that if the affidavit filed accomplishes the purpose of the act, even though not in the saying that it operated to extend the debt or obligation, which is entirely distinct from the mortgage lien. Counsel asserts that any debt, maturing several years hence, may be secured by a chattel mortgage, and urges this as indicating that the renewal section can not contemplate a statement of debt extension. But it is decided that a mortgage thus given to secure notes maturing later than the maximum statutory period, is thereby rendered void as to creditors and purchasers. (*Silvis* v. *Aultman & Co.*, 31 N. E. 11, 13.) The statute referred to in the case last cited is useful by way of contrast to show how a statute would be worded if it was intended that the affidavit should state the time to which the mortgage was extended. It is a primary rule of construction that a statute must be so interpreted, first, as to accomplish its purpose; and second, so as, if possible, to give some meaning and effect to every word employed. The interpretation contended for by appellant not only renders the words "renewed or extended" in the last italics clause without meaning, but renders them absolutely contradictory.

Were not the foregoing suggestions conclusive of this ques-

tion, the further point may be suggested that respondent's mortgage was good until August 22nd without renewal. Meantime the code went into effect, and under its changed provision (controlling as to effect of notice after July 1, 1895) appellants could acquire no right against us because they had actual notice of our mortgage. (§ 3861 of the Civil Code; Cobbey on Chattel Mortgages, 598 and cases cited; *Riederer* v. *Pfaff*, 61 Fed. 872; *Bank* v. *Kuhnle*, 31 Pac. 1057, 1058; *Nix* v. *Wiswell*, 54 N. W. 620; *Rice* v. *Kahn*, 35 N. W. 465, 466 foot.)

HUNT, J.—The question for decision is: Was the affidavit for renewal, which respondent relies upon, sufficient to renew the mortgage? The affidavit is as follows:

"George F. Cope, cashier, being duly sworn, deposes and says: (1) That he is the mortgagee named in a certain chattel mortgage made and executed by Lucien Eaves, the mortgagor therein named; (2) that said mortgage bears date upon the 22nd day of June, 1895, and that the same was filed of record in the office of the County Recorder of the County of Lewis and Clarke, and State of Montana, upon the 22nd day of June, 1895; (3) that the amount of the debt or obligation secured by the said chattel mortgage is the sum of one thousand and sixty-six dollars, and that there is now justly owing upon said debt or obligation the sum of one thousand and sixty-six dollars; (4) that the time for the payment of said last mentioned sum is hereby extended to the 22nd day of June, A. D. 1896; (5) that said debt or obligation was neither made, nor is the same renewed or extended, to hinder, delay, or defraud the creditors or subsequent mortgagees of the mortgagor. George F. Cope, Cashier.

"Subscribed and sworn to before me, this 26th day of June, 1895. Frank D. Miracle, Notary Public in and for the County of Lewis and Clarke, State of Montana."

The statute under which renewals of chattel mortgages were made when the mortgage involved herein was given and renewed was as follows:

"Every mortgage of goods, chattels or personal property made, acknowledged and filed as provided by the laws of this state may be renewed at or before the maturity of the debt or obligation secured thereby in case such debt or obligation, or any part thereof, be unpaid or unfulfilled, by filing an affidavit showing the date of such mortgage, the name of the mortgagor and mortgagee, the date of filing the same, the amount of the debt or obligation secured thereby, and the amount of the debt justly owing at the time of filing such affidavit or the conditions of the obligations unfulfilled, the time to which the same is extended, which time shall not exceed one year, and that such debt or obligation was neither made nor renewed or extended to hinder, delay or defraud the creditors or subsequent mortgagees of the mortgagor, which affidavit shall be subscribed and sworn to by the mortgagee before an officer authorized to administer oaths, and filed in the office where such mortgage therein described is filed, and thereupon the clerk and recorder of deeds of such county shall attach such affidavit to the mortgage therein described and note the date of filing thereof opposite the entry of the mortgage therein described in the book provided by law for the entry of chattel mortgages and thereby such mortgage shall be renewed, continue and be valid and of full force and effect upon the goods, chattels or personal property described therein for the time stated in such affidavit, not to exceed one year."

Does the affidavit, quoted above, conform to the statute? We think it does, and that when said affidavit was filed in the office where the original mortgage therein described was filed, and when the clerk and recorder of deeds of the county in whose office the mortgage was filed attached the affidavit to the mortgage therein described, and noted the date of filing as provided by the statute, thereby the mortgage was renewed, was continued and became a valid lien, of full force and effect upon the chattels described in the mortgage, for the time specified in the affidavit.

The statute declares that "every mortgage * * * made, acknowledged and filed as provided by the laws of this state

may be renewed * * * by filing an affidavit," etc. Thus, the right to have the mortgage renewed is complete, provided the necessary affidavit to make effectual the renewal is made and filed. The affidavit contemplated must show six essential facts: (1) The date of the mortgage; (2) the name of the mortgagor and mortgagee; (3) the date of filing the (same) mortgage; (4) the amount of the debt or obligation secured (thereby) by the mortgage; (5) the amount of the debt justly owing at the time of filing of the affidavit, or the conditions of the obligation unfulfilled; (6) the time to which the (same) debt or obligation unfulfilled is extended; and (7) that such debt or obligation unfulfilled was neither made nor renewed nor extended to hinder, delay or defraud creditors or subsequent mortgagees of the mortgagor. It is by carrying out this prescribed method of showing these facts, and by filing an affidavit containing them, that the mortgage is renewed.

Counsel for appellant would have us read the sixth essential of the affidavit as though it required the affidavit to show "the time to which the mortgage is extended," and not "the time to which the debt or unfulfilled obligation is extended." But if it is kept in mind that the renewal is by means of filing the affidavit referred to, and not by indorsements or writings upon the original mortgage, we are held to a consideration of just what the contents of the affidavit alone must be, and to an interpretation of the words and sense of the statute which provide for the showing to be made therein. The mortgage is a separate instrument, in no way affected until the affidavit has been filed and the proper entries have been made. By section 1542 it becomes the subject of renewal, and although necessarily to be referred to in the affidavit for renewal, still its renewal is accomplished by means of the affidavit, and by it alone. Examining the fifth subdivision of the necessary contents of the affidavit, we find that the amount of the debt justly owing, or the condition of the obligation unfulfilled, must be shown. By the condition of the obligation unfulfilled is meant the condition of the outside obligation to secure which the mortgage was originally given. The mortgagor, for ex

ample, may have obligated himself to indemnify the mortgagee for signing a note as surety in a bank, or for signing and executing a penal bond or an attachment bond, in which cases the affidavit must show the condition of the obligation of the mortgagor to the mortgagee yet unfulfilled. If it be a debt owing, the amount need only be stated. Under this interpretation of the fifth statement of the affidavit, the adjective "same," in the sixth statement, refers to the amount of the debt or obligation just before mentioned in the fifth statement as necessary to be shown in the affidavit for renewal. Then comes the seventh essential showing of the affidavit, where the reference of the statute to "such" debt or obligation again relates to the certain specified debt or obligation unfulfilled theretofore mentioned, and to secure which the mortgage was given.

We are confirmed in this construction of the statute by examining Section 1543 of the Compiled Statutes. It is therein provided that the filing of the affidavit required by Section 1542 "shall not be construed to extend the time of maturity of any debt or the execution of any obligation secured by such mortgage," but the same may be enforced, and such mortgage foreclosed, unless agreement be made between the mortgagee and mortgagor extending the time of payment of such debt or fulfillment of such obligation to the time stated in such affidavit. The words "obligation secured by such mortgage" are evidently any debt or obligation secured by such a mortgage as may be renewed under the provisions of Section 1542. Section 1543 pertains especially to the debt or obligation, as contradistinguished from the mortgage itself; while Section 1542 relates especially to the mortgage. Again, the latter section provides for the renewal of the mortgage; but the former expressly says that there shall be no extension of the time of maturity of the debt or obligation secured by merely filing the affidavit referred to, unless there is an agreement between mortgagee and mortgagor extending the time of payment of the debt or fulfillment of the obligation to the time stated in the affidavit of renewal.

It follows from this reasoning that Section 1542 is ineffectual for the purpose of extending the time of the maturity of the debt or obligation without Section 1543, for no extension of a mortgage only would carry with it the extension of the time of maturity of a debt secured by such mortgage. A mortgagee may, under Section 1542, keep his mortgage lien alive for the length of time stated in his affidavit of renewal; and thus third persons are put on notice of his extended lien and the amount due him, but the mortgagor may not derive the benefit of having the maturity of his debt extended through the mortgagee's act of renewal, unless he can agree with the mortgagee to extend the time of payment of such debt. If he makes such an agreement, the statute is for his advantage, and he secures an extension without the cost and annoyance of a new mortgage. If he cannot make it, although the mortgagee may extend his mortgage, he can foreclose at any time within the period of extension.

The question at issue being purely one of statutory construction, our judgment is that respondent's affidavit is in accord with Section 1542; and, by filing the same, he thereby renewed the mortgage described in his complaint.

The judgment is affirmed.

Affirmed.

PEMBERTON, C. J., and PIGOTT, J., concur.

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STATE EX REL. BRAY ET AL., APPELLANTS, v. JOSEPH V. LONG, ET AL., RESPONDENTS.

[Submitted March 28, 1898. Decided March 31, 1898.]

School Districts—Constitutionality of Election Laws—Title of Bill.

1. Ordinance 1, Section 24 and Article 11, Section 1, which provides for the establishment and maintenance of a general, uniform and thorough system of public, free common schools, does not prohibit the enactment of a law classifying school districts for the purposes of the election of trustees according to population, so long as the

law provides for a reasonable classification and is reasonable and uniform in its operation and effect upon all districts within the same classification—although at the time of the passage of the act, only a few districts would be included within the law.

2. **A law which classifies school districts according to population and provides a system for the election of trustees which is uniform for all districts within the same class is not a local or special law within the meaning of Section 26, Article 5 of the Constitution, although the law provides that the elections in the different classes shall be held under different supervision.**
3. **The title of a bill was as follows, "An Act to amend Sections 1770 and 1782 inclusive, of Article 4, Chapter 6." etc. *Held*, that the title fairly stated the subject of the legislation, and that the omission to specifically enumerate the intermediate sections did not make the bill invalid as to them.**
4. **An election law which provides that a resident of the district who is not a citizen of the United States may register upon his taking an oath that he is entitled to become a citizen of the United States and that it is his honest intention to become such before the school election day of that year, is not in violation of Section 2, Article 9 of the State Constitution which provides that no person except citizens of the United States shall have the right to vote.**
5. **The court refused to decide whether that section of the law which fixed the term of office at three years is in violation of Section 6, Article 16 of the State Constitution, which provides that "The Legislative Assembly may provide for the election or appointment of such other county, township, precinct and municipal officers as public convenience may require, and their term of office shall be as required by law, not in any case to exceed wo years, etc." *Held*, however, that, even if that section is in violation of the section of the constitution referred to, the remainder of the act is not thereby rendered invalid; but, as the part fixing the term is severable, the law is valid for the terms prescribed, not in conflict with the constitution.**
6. ***Held*, further, that, even if one section of the act could be construed to be an attempt to increase the salary of the trustees who held over, and, therefore, in violation of Section 31, Article 5 of the Constitution, the remainder of the act, including the provision for the election of new trustees, would not thereby be rendered invalid.**
7. **Section 5, Article 3 of the Constitution provides that "All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." The act of 1897 provides for not less than two nor more than five polling places in districts of the first class. It appeared that the facilities were somewhat inadequate to accommodate those who wished to vote; but it further appeared that those who were not able to vote did not attempt to do so until the latter part of the day. *Held*, that the law would not be held to be in conflict with the section of the constitution referred to.**
8. **Section 27, Article 5 of the constitution provides that "the presiding officer of each house shall in the presence of the house over which he presides sign all bills and joint resolutions passed by the Legislative Assembly immediately after their titles have been publicly read, and the fact of signing shall be at once entered upon the journal. The bill in question bore the signature of the presiding officer of each house, but the journal omitted to show that the bill was signed as required; it was not claimed, however, that the bill was not duly signed. *Held*, that the presumption is that the legislature and the presiding officers did their duty, and that the bill was regularly passed.**

Appeal from District Court, Silver Bow County. William Clancy, Judge.

QUO WARRANTO by the state, on the relation of Edwin Bray, O. J. McConnell, F. E. Curtis, and J. A. Baker against Joseph V. Long, John B. Frederic, Michael Burke and Au-

gustus T. Morgan. From a judgment for defendants plaintiff and relators appeal. Affirmed.

Statement of the case by the court.

Proceedings in *quo warranto*. The relators allege that on the first Saturday of April, 1894, an election was held within and for School District No. 1, Silver Bow county, pursuant to the provisions of the law, for the election of trustees of said school district for the term of three years immediately succeeding said election; that at said election the plaintiffs Bray, McConnell and Curtis received the greatest number of legal votes cast for trustees of said school district for the term aforesaid, and were duly declared elected, and were duly qualified to serve, and did qualify as required by law, and entered upon the discharge of the duties, until prevented from continuing to discharge the duties by the wrongful acts of the defendants; that on April 17, 1897, the defendants usurped the offices of school trustees, held as aforesaid by the relators, and without authority held and still hold and exercise the functions of school trustees. The prayer of the complaint is for a judgment that the defendants are not entitled to said offices, and that they be ousted therefrom, and that the relators are entitled to said offices, and that they be put into possession of the same.

The answer contains a denial of the material allegations of the complaint, and affirmatively avers that on the first Saturday of April 1897, an election for school trustees was duly held for School District No. 1, Silver Bow County, under the provisions of "an act to amend Section 1770 and 1782, inclusive of Article 4, Chapter 6, Title 3, Part 3 of the Political Code, relating to the election of school trustees, and to amend said article by adding thereto six sections," etc., approved March 6, 1897; that at said election, which was regularly held, the defendants, who had been duly nominated and who were duly qualified, were elected as school trustees, and the result of such election was duly declared, and the said defendants did duly qualify pursuant to law, and ever since April

17, 1897, have been in the possession and entitled to the possession of their respective offices as school trustees of said school district, and have ever since discharged the duties pertaining to said offices; and that the defendants Long, Frederic and Burke were each elected for the term of three years as the successors of the relators Bray, McConnell and Curtis. It is further alleged that the relators voluntarily surrendered their offices to the defendants.

The relators denied the affirmative matter in the defendants' answer, and, in affect, averred that the act under which the defendants claim to have been elected school trustees is unconstitutional and void.

The cause was tried to the court without a jury on March 1, 1898. Evidence was heard, and judgment was rendered in favor of the defendants and against the relators. The plaintiff and the relators appeal from the judgment. The appeal to this court was submitted three days ago.

E. N. Harwood, for Relators.

Emmett Callahan, for Respondents.

PER CURIAM.—The questions raised by this appeal are very important, and of public concern. They affect several school elections in the state, and that the electors may be correctly guided as to what laws obtain controlling school elections to be held a few days hence, we are asked to decide the case at once. We shall do so, having given our attentive consideration to the points presented since their submission to the court. But, owing to the pressure of time, we shall very briefly and succinctly review the several arguments relied upon, and urged upon our consideration.

1. It is conceded that the principal question involved is the constitutionality of the act of the Fifth Legislative Assembly designated as "Senate Bill No. 56," entitled "An act to amend Sections 1770 and 1782 inclusive, of Article 4, Chapter 6, Title 3, Part 3 of the Political Code, relating to the election of school trustees, and to amend said article by adding

thereto six additional sections with reference to the election of school trustees, providing for registration in certain districts, and compensation for school trustees in certain districts, and repealing all acts and parts of acts in conflict herewith." (Laws of Montana, Fifth Session, page 136.) The relators challenge the constitutionality of said law upon eight grounds. We shall examine them *seriatim*:

1. It is said that the law is unconstitutional because it breaks and destroys the system and uniformity required by Constitutional Ordinance 1, Section 4 and Article 11, Section 1, which requires provision to be made for the establishment and maintenance of a uniform system of public schools, and that the Legislative Assembly shall establish and maintain a general, uniform and thorough system of public, free, common schools.

We do not believe that by the constitutional section cited there is any restriction upon the right of the Legislative Assembly to classify school districts for purposes of election of trustees with relation to population, so long as the law passed makes a reasonable classification, and is reasonable and uniform in its operation and effect upon all districts within such classification made. The classification may only extend to a few districts this year, yet that does not impair the validity of the law; for another year it may govern many more districts, and must, if they have sufficient population to be brought within the classification provided for. (*State* v. *Donavan* (Nev.) 15 Pac. 783.) Nor do we think such a law breaks or destroys the system in the establishment and maintenance of the public schools. The uniformity and thoroughness of a system of public schools are not interfered with by providing for a general and reasonable method of the election of trustees, even if the methods of election vary according to the number of inhabitants in the several districts.

2. It is said the law is local and special, hence is unconstitutional, under Section 26, Article 5 of the Constitution.

We hold to the contrary. It is not local, for it may and does apply to any or all school districts of certain populations

within the state. It is not special, because it applies without discrimination to all districts within any of the several classifications made. It does not regulate elections by prescribing different voting qualifications in any one district from those prescribed in other districts. Its provision in this respect control in every district within the several classifications made.

The mere fact that in districts of the first class the election shall be under the supervision of the Board of County Commissioners, while in districts of the second class elections are under supervision of school trustees, does not make it a local or special law, or destroy the uniformity and system in respect to the common schools. A particular method of supervision of an election, if common to all districts of a certain class, does not change the system of the schools at all; nor does it make the law defining the power of such supervision, and vesting it in the county commissioners, a special law.

3. It is argued that, excepting Sections 1770 and 1782, the bill is unconstitutional because the title is, "An act to amend Sections 1770 and 1782, inclusive, of Article 4, Chapter 6, Title 3, Part 3 of the Political Code," etc. The omission to specifically enumerate the sections between Sections 1770 and 1782, and which are very plainly covered by the word "inclusive," is not fatal to the bill. No one could misunderstand the title, or be misled by the words of it. It fairly apprised one of the subject of the legislation, and that the entire number of sections of a certain specified article of the code, from Section 1770 to 1782, inclusive, thereof, were to be amended.

4. It is next argued that it is unconstitutional in that it permits persons to vote who are not qualified electors under the constitution of the state. The bill requires registration of voters in certain districts.

We quote the oath for registration. It is as follows: "I am a citizen of the United States or that I am entitled to become a citizen of the United States, and it is my honest intention to become such before the school election day of this

year; that I am of the age of twenty-one years, and will have actually and not constructively, been a *bona fide* resident in Montana twelve months, and in the school district thirty days next preceding the day of election, and that I am not registered elsewhere in this school district for this election year, so help me God."

It is also provided by section 1778 that: "In districts of the first class the person desiring to vote shall at the time he or she presents his or her ballot, announce his or her name, and the judges of election, if they find such name on the official 'check list,' or if not and he or she takes the oath herein prescribed, one of the judges shall take the ballot and deposit it in the ballot box, and the clerk shall immediately write the name of such person on the poll list, and one of the judges shall write opposite the said name on the official check list the word 'Voted.' * * * Provided, however, that if any person, otherwise qualified to vote, makes oath before one of the judges that he or she registered at any registry precinct in such district, naming it, before a registry agent, giving his name, to vote at said election, and that his or her name does not appear correctly on said check list, or has been omitted therefrom, or that by reason of absence or sickness during the period of registration he or she was unable to register, the judges of election shall make an entry opposite his or her name on the poll list to the effect that he or she was sworn and voted and shall permit him or her to vote."

The special objection here pressed is that by these provisions just quoted persons who are not citizens of the United States may vote. But we must take the law together in its several parts, and construe it as enacted in harmony with, and not in violation of, the constitution. Neither the provisions requiring registration of voters, nor the oath of registration, authorize a person to vote who is not entitled to that privilege under the constitution. The object of permitting one to register, who, although not a citizen at the time of the registration, yet intends to become such before election day, is to authorize one to register who will be entitled to

vote if between the time of registration and of election he becomes a citizen of the United States. The statute only facilitates registration, and secures to one qualified to vote on election day that right. The right of challenge is preserved (Section 1779), and by the oath put upon a challenge the voter must swear that he is a citizen of the United States. Thus, it is plain there was no intent or effort to lessen the qualifications of voters.

5. The law is assailed because it fixes the term of school trustees at three years; the contention of appellants being that Article 16, Section 6, of the Constitution, limits the term of such officer to two years. We express no opinion upon the term of office of school trustees pursuant to the provision of the law under examination. At some future time that question may directly arise. We are satisfied, though, that, even if the term cannot run for three years, but does run for two years only, the whole law cannot be overthrown; but, as the part fixing the term is severable, the law will be upheld as a valid statute providing for the election of trustees for the terms prescribed, not in conflict with the constitution.

6. Article 5, Section 31 of the Constitution, is as follows: "Except as otherwise provided in this constitution, no law shall extend the term of any public officer, or increase or diminish his salary or emolument after his election or appointment; provided, that this shall not be construed to forbid the Legislative Assembly from fixing the salaries or emoluments of those officers first elected or appointed under this constitution, where such salaries or emoluments are not fixed by this constitution."

This clause is violated, say the appellants, because the statute (Section 1787) gives to each of the trustees who have been elected prior to 1897, and who held over after the elections of that year, the sum of four dollars for each meeting of the board of trustees which he or she may attend. Granting, for the sake of argument, that the section of the statute cited attempts to increase the salary of trustees who held over, no portions of the law, except those pertaining to increased fees,

could be held invalid, while, as to trustees elected under the law of 1897, the statute is clearly constitutional.

7. It is also vigorously urged that the bill is unconstitutional because it "prevents the free exercise of the right of suffrage" as guaranteed by Section 5, Article 3 of the constitution, which provides as follows: "All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

The argument of the learned counsel for appellants upon this feature of the case is that "the provisions of the act debarred and excluded some 4.000 electors of said school district from going to the polls and casting their votes at the school election attempted to be held pursuant thereto, at which election respondents claim to have been chosen trustees." It appears from the evidence that there was an unusual interest taken in the result of the election, and that at divers times during the day large numbers of voters crowded about the several voting places, and that when the polls closed a number of persons who had stood in line some time awaiting their turns to vote had not cast their ballots, and were unable to do so. There were five voting places, and no doubt the facilities were somewhat inadequate, to accommodate those who wished to vote; but as the complaint against the law in this respect is really based upon inconveniences imposed upon electors who, for the most part, did not attempt to vote until the latter part of the day, we cannot hold the law unconstitutional for the reasons asked.

8. We pass now to the final ground urged by appellants, which is that Senate Bill No. 56 never was passed by the Legislative Assembly in the manner required by the constitution.

The constitution provides that "the presiding officer of each house shall in the presence of the house over which he presides sign all bills and joint resolutions passed by the Legislative Assembly immediately after their titles have been publicly read, and the fact of signing shall be at once entered upon the journal." (Constitution Article 5, § 27.)

The journal omitted to show the fact that the bill in question was signed by the presiding officer of each house. The enrolled bill bears the signatures of such presiding officers, and appellants do not aver or argue that the bill was not, as a fact, duly signed by such presiding officers.

The presumption is that the legislature and the officers thereof did their duty, and that the enrolled bill was regularly passed. This presumption is strong, and is indulged in by the judicial branch of the government as necessary to the "peace and good order of the state." Whatever may be the rule in respect to the power of the court to go back of an enrolled bill where it is directly charged that the journal misrepresents facts, yet in a case where the journal simply omits to affirmatively show that an act was done which ought to have been done, by the rule of the constitution prescribing the observance of a form of proceeding by the legislature, the courts cannot go behind the enrolled bill to ascertain whether such forms were observed, and will rely upon its attendant presumptions of regularity. (*State ex rel. Reed* v. *Jones*, 6 Wash. 452, 34 Pac. 201.)

In *In Railroad Co.* v. *Governor*, 23 Mo. 353, Judge Scott thus ably states the principle which controls: "Whilst the power of the courts to declare a law unconstitutional is admitted on all hands as being necessary to preserve the constitution from violation, yet such power is claimed and exercised in relation to laws which on their face show that the constitutional limits have been transcended. The reason of this principle limits the claim of jurisdiction to such cases. The constitution is designed to limit the powers of the government, and to confine each of the departments to its appropriate sphere. If the legislature exceeds its power in the enactment of a law, the courts, being sworn to support the constitution, must judge that law by the standard of the constitution, and declare its validity. But the question whether a law on its face violates the constitution is very different from that growing out of the noncompliance with the forms required to be observed in its enactment. In the one case a power is exer-

cised not delegated, or which is prohibited, and the question of the validity of the law is determined from the language of it. In the other, the law is not in its terms contrary to the constitution; on its face it is regular, but resort is had to something behind the law itself in order to ascertain whether the general assembly, in making the law, was governed by the rules prescribed for its action by the constitution. This would seem like an inquisition into the conduct of the members of the general assembly, and it must be seen at once that it is a very delicate power, the frequent exercise of which must lead to endless confusion in the administration of the law."

All other objections to the constitutionality of the law go to the failure of the legislature to observe certain forms in its enactment, but, as they are answered by the principle just laid down, it is unnecessary to fully mention or discuss them. The judgment is affirmed.

Affirmed.

PATRICK J. HARRIGAN ET AL., RESPONDENTS, v. MICHAEL LYNCH, APPELLANT.

[Submitted March 25, 1898. Decided April 4, 1898.]

New Trial—Record—Mining Claims—Tenants in Common—Injunction—Evidence.

1. NEW TRIAL—*Record.*—Waiver of objection to want of notice of intention to move for a new trial will be inferred from the action of plaintiff in offering amendments to the proposed statement or bill of exceptions to be used on hearing of the motion, without preserving an objection to the same because of the lack of such notice.
2. MINING CLAIM—*Tenants in Common—Evidence.*—Evidence which shows that the defendant was working a mining claim owned by him and plaintiffs as tenants in common, without their consent, that he carried on the work in his own manner, extracted and took away the ores, made his own arrangements for milling the ores, and applied the proceeds to the payment of obligations incurred by him in operating the mine, and that he intended to continue the work, sustain a finding that he was exercising exclusive ownership over the portion of the mine which he was working, and that he had taken away common property, under Section 592 of the Code of Civil Procedure.
3. SAME—*Injunction.*—Under Section 592 of the Code of Civil Procedure, one tenant in common of a mining claim is entitled to an injunction against his co-owners who are doing development upon the claim without his consent.

4. SAME—*Evidence.*—Under Section 598 of the Code of Civil Procedure, which provides that "if any person shall assume and exercise exclusive ownership over, or take away, destroy, lessen in value, or otherwise injure or abuse any property held in joint tenancy, or tenancy in common, the party aggrieved shall have his action for the injury in the same manner as he would have it if such joint tenancy or tenancy in common did not exist," the fact that the work being done by the defendant tends to develop the claim, does not constitute a defense to an action brought to enjoin him from working the same, when he is assuming exclusive ownership over, or is taking away any of the common property.

Appeal from District Court, Lewis and Clarke County. Henry N. Blake, Judge.

ACTION by Patrick J. Harrigan and another against Michael Lynch. From a judgment in favor of plaintiffs, and from an order denying a new trial, defendant appeals. Affirmed.

Toole & Wallace, for Appellant.

As the common law prevails here (except as modified by statute—Section 5152 of the Political Code) the following common law principles are important. (a) Co-tenants hold by unity of possession. Therefore when the property is vacant any co-tenant may enter and occupy the whole, and if the property be not capable of a double occupancy, the other tenants await their turn and occupy when a vacancy occurs. (Freeman on Co-tenancy, §§ 250, 258; *Roper* v. *Lodge*, 33 Am. Rep. 61; *Owen* v. *Morton*, 24 Cal. 376, foot; *Waring* v. *Crow*, 11 Cal. 371, foot; *Tevis* v. *Hicks*, 38 Cal. 239, foot; *Miller* v. *Myles*, 46 Cal. 535; *Coleman* v. *Clements*, 23 Cal. 245, 247, foot; *Aguirre* v. *Alexander*, 58 Cal. 28.) This right of occupancy involves the right of use, i. e. to "make such profits as he can by the usual means of getting a benefit from the land;" and gives the power to do what he wills with the property so long as he does not misuse or destroy it or oust his co-tenants, as ouster is technically defined. (Freeman on Co-tenancy, §§ 250, 258; *Sargent* v. *Parsons*, 12 Mass. 152, middle; *Crane* v. *Waggoner*, 27 Ind. 53, top; *Regan* v. *McCoy*, 29 Mo. 367, middle and cases.) This use when applied to a quartz mine means the workmanlike mining thereof, and converting the ores extracted into money, which is neither

misuse, destruction or waste. (*Neil* v. *Neil*, 19 Penn. St. 328, foot, 329, top; *Irvin* v. *Covode*, 24 Pa. St. 166, 167; *McCord* v. *Oakland, Q. M. Co.*, 64 Cal. 140, foot; 141, foot; 142, top; *Anaconda Co.* v. *Butte & Boston Co.*, 17 Mont. 324.) As to the force of this statute, it is simply remedial, giving new remedies for certain enumerated acts, which, even at common law, were wrongful in a co-tenant. It was not intended to take a right from one co-tenant and bestow it on another. The acts referred to by the statute, Section 592, Code of Civil Procedure, are: 1. Assertion and assumption of exclusive ownership. 2. Taking away, destroying, lessening in value or otherwise injuring or abusing. These acts were wrongful at common law. The assumption of exclusive ownership is nothing more nor less than ouster at the common law. (*Feliz* v. *Feliz*, 105 Cal. 4; *Gordon* v. *Pearson*, 1 Mass. 323.) Ouster is spoken of as "the assumption of ownership by one co-tenant," in *Newell* v. *Woodruff*, 30 Conn. 492. For ouster the common law only provided two remedies. 1. Ejectment. 2. Forcible entry. (*Rogan* v. *McCoy*, 29 Mo. 367, foot.) And gave no remedy at all for waste. Though in equity there was a remedy by injunction. (*McCord* v. *Oakland Q. M. Co.*, 29 Pac. 864.) Ouster then or the exercise or assumption of exclusive ownership was forbidden as well by the common law as by the statute; while mining was and is a rightful use and enjoyment, and cannot constitute, when properly done, any of the acts prohibited by the statute. To constitute this ouster or exercise and assumption of exclusive ownership there must not only be exclusive occupancy and use, i. e. mining, but also, either a denial of title, or refusal to let into possession on demand, or other similar acts unequivocally evidencing the intent to exclude the other and hold exclusively for himself. (*McLaughlin* v. *McLaughlin*, 30 Atl. 607, 608; *Owen* v. *Morton*, 24 Cal. 373, 376; *Carpentier* v. *Gardiner*, 29 Cal. 160; *Spect* v. *Gregg*, 51 Cal. 198, 545; *Winterburn* v. *Chambers*, 91 Cal. 180; *Feliz* v. *Feliz*, 105 Cal. 4; Freeman on Co-tenancy, § 248, page 304; *Coleman* v. *Clements*, 23 Cal. 247; *Carpentier* v. *Webster*, 27

Cal. 524; *Miller* v. *Myles*, 46 Cal. 538; *Greer* v. *Tripp*, 56 Cal 209, 212; *Phelan* v. *Smith*, 100 Cal. 167; *Newell* v. *Woodruff*, 30 Conn. 492, 497.) The purchase or attempt to purchase the interests of one co-tenant raises a presumption of an intention to recognize the interests of all other co-tenants. (Also *Brook* v. *Eggleston*, 13 So. Rep. 850.) While the necessity of a demand to be let into possession, before there can be a claim of ouster where the entry was into vacant property, is set forth in *Avon Manufacturing Co.* v. *Andrews*, 30 Conn. 489; *Crane* v. *Waggoner*, 27 Ind. 52; *Miller* v. *Myles*, 46 Cal. 539.)

T. J. Walsh, for Respondent.

An attack is made upon some of the findings on the ground that the evidence is insufficient to sustain them. But there is no opportunity to review the evidence, as there is no notice of intention to move for a new trial, in the record. (*Grinnell* v. *Davis*, 19 Mont., 50 Pac. 556.) There is no great controversy about the facts. The appellant began operating the mine without asking the permission or getting the consent of his co-tenants. He did not invite them to participate with him in the work. He did not notify them that he was going to operate or was operating the property. He conducted the work in his own manner, contracted the necessary obligations in his own name, made his own arrangements about milling the ore, appropriated the amalgam and applied the proceeds of it (to the obligations he contracted) as he saw fit. He never rendered any account to respondents, and refused to render them an account when they asked for it. It would seem as though, in view of the rulings of this court in *Anaconda Mining Co.* v. *Butte & Boston Mining Co.*, 17 Mont. 519; *Red Mountain Mining Co.* v. *Esler*, 18 Mont. 174, *Connole* v. *B. & M. Co.* (not yet reported), there was little scope for argument on this state of facts. The right of a co-tenant to mine the common property is one regarding which a strange diversity of views is held. In England it is held that the co-tenant may extract the valuable deposits, but

he must account to his co-tenants for any profits made in the enterprise. (*Job* v. *Patton*, L. R. 20 Eq. 84.) It has been so held also in Virginia, a statute influencing the holding to some extent. (*Graham* v. *Pierce*, 19 Gratt. 28.) In California it is held that the working co-tenant can not be restrained from operating, and is under no obligation to account. (*McCord* v. *Oakland Q. M. Co.*, 64 Cal. 134-145.) In Illinois it is held that a co-tenant can not mine the property without the consent of his co-tenants. (*Murray* v. *Haverly*, 70 Ill. 318.) These conflicting opinions are, however, of comparatively little consequence to us, since this court has declared, in the decisions above referred to, the law of this state to be that one co-tenant may have injunction against another under the circumstances of this case, by reason of the plain provisions of our statute, Section 592 of the Code of Civil Procedure.

PIGOTT, J.—By this appeal the court has again before it for interpretation the provisions of Section 592 of the Code of Civil Procedure. The parties are tenants in common of the M. L. lode claim, situated in Lewis and Clarke county. Plaintiffs own an undivided one-fourth, and the defendant an undivided one-third interest in the claim.

The complaint alleges that the defendant, without the consent of the plaintiffs, had extracted gold ore from the claim, which he appropriated to his own use, and was continuing and threatening to continue to extract such ore and dispose of the same, and to convert it to his own use, all to the damage of the property; that defendant assumed and exercised exclusive ownership over the common property; that defendant was conducting operations in a wasteful manner; and that he refused to render an account to plaintiffs. The relief demanded is an injunction restraining defendant from committing the acts complained of, and an accounting.

The answer admits the extraction of the ore, and defendant's intention to continue such extraction, but denies that his operation of the claim was without plaintiffs' consent, or that

the claim was injured by the acts of the defendant, and alleges, in effect, that all the proceeds of the ores taken out by him were used in defraying the expenses of developing the claim and hauling and milling the ore, and sets up that his operations were conducted in a skillful manner; that the mine has been developed and benefited by the operations mentioned in the complaint.

Upon the trial it appeared, among other things, that defendant had taken out and reduced 828 tons of ore, of the probable gross value of $3.25 a ton, and that the cost of hoisting and milling was approximately $4.01 per ton; that there was no profit, in money, derived from his operations; that defendant was working the claim without the consent of plaintiffs, had failed to render an account when they asked for it, and that he was proceeding with the work in all respects as if he were sole owner. Defendant offered to show that the work performed by him enhanced the value of the property, and that he was working in a shaft which had been sunk by him in 1885 with the consent of the then owners; but, on objection, the evidence offered was excluded as immaterial.

The court found that defendant, since April, 1896, had taken away from the claim 828 tons of ore, of the value of $3 per ton, and had disposed of the same, and converted the proceeds to his own use, and had thereby lessened in value and injured the common property, and threatened to continue to take away and dispose of the ore, but that he had applied all the proceeds of the ores milled or disposed of by him in payment of legitimate expenses incurred in the necessary extraction of the ore; that in his operations he had developed the claim in a miner-like manner; that plaintiffs did not consent to the acts of defendant, but might, with the exercise of slight diligence, have ascertained that he was sinking a shaft upon the property; that defendant performed the labor in good faith at his own expense, for the purpose of developing the claim; and that the defendant was exercising exclusive ownership over the part of the claim upon which he performed work. From these findings the court drew the conclusion of

law that, within the meaning of Section 592 of the Code of Civil Procedure, defendant had taken away ore from the claim, and thereby injured it, and lessened its value, without the consent of the plaintiffs. Judgment was entered enjoining defendant from extracting ore from the claim, or reducing or otherwise disposing of any ore extracted from it. From this judgment, and from an order refusing a new trial, defendant appeals.

1. Plaintiffs contend that the question whether the evidence is sufficient to sustain the findings is not before the court, for the reason that the notice of intention to move for a new trial, while in the transcript, is not included in the statement on such motion or in a bill of exception. This court has many times held such notice of intention to be an indispensable part of the record on appeal from the order granting or denying a new trial (*Gum* v. *Murray*, 6 Mont. 10; 9 Pac. 447; *Morse* v. *Boyde*, 11 Mont. 248, 28 Pac. 260; *Grinnell* v. *Davis*, 20 Mont. 222, 50 Pac. 556); but in none of the cases did the record disclose facts from which a waiver of the objection to a want of notice would be inferred. In the case at bar, however, it is clearly shown by the record itself that plaintiffs offered amendments to the proposed statement served by defendant, without then or at any time reserving objection to the want of notice of intention to move for a new trial; and this, we think, amounted to a waiver of notice. (*Williams* v. *Gregory*, 9 Cal. 76, cited with approval in *Payne* v. *Davis*, 2 Mont. 384; *Frost* v. *Meetz*, 52 Cal. 670; *Godchaux* v. *Mulford*, 26 Cal. 316; *Brundage* v. *Adams*, 41 Cal. 619; *Savings and Loan Society* v. *Moore*, 68 Cal. 158, 8 Pac. 824; *Christy* v. *Spring Valley Water Co.* 68 Cal. 73, 8 Pac. 849; *Hobbs* v. *Duff*, 43 Cal. 485.) The view stated renders unnecessary the consideration of the question whether a notice of intention to move for a new trial which is included in the transcript, but is not embraced in the statement or in a bill of exceptions, is part of the record on appeal; and the question is reserved.

2. Section 592 of the Code of Civil Procedure provides: "If any person shall assume and exercise exclusive ownership

over, or take away, destroy, lessen in value, or otherwise injure or abuse any property held in joint tenancy or tenancy in common, the party aggrieved shall have his action for the injury in the same manner as he would have if such joint tenancy or tenancy in common did not exist."

The findings of the court are responsive to the issues, and are sufficient to bring the case within the statute quoted, and to support the decree awarding the injunction. Failure to find specially whether the defendant had refused to render an account is of no moment, as the decree does not give relief beyond the injunction; and the contention of plaintiffs that there is an implied finding in their favor on the accounting issue will not be decided, but that question is also reserved.

Defendant argues, however, that the evidence does not justify the finding that he was exercising exclusive ownership over that part of the claim upon which he was working, or the finding that, in extracting and removing the ore, he had taken away any of the common property, within the meaning of section 592. He complains also of the action of the court in excluding the evidence hereinbefore stated, offered by him.

We think the evidence is ample to justify the material findings. It was shown that the defendant operated the mine without the consent of plaintiffs; that he carried on the work in his own manner, contracting obligations arising therefrom in his own name; extracted and took away the ores; made his own contracts and arrangements in respect of milling the ores; appropriated the amalgam, and applied the proceeds to the payment of obligations incurred by reason of his operations; and that he intended to continue the work. That he did not render an account to the plaintiffs may, perhaps, be given some weight as tending to prove an assumption and exercise of exclusive ownership by him.

By the provisions of Section 592, the question whether plaintiffs can maintain this action is reduced to the simple inquiry: Could it have been maintained if the plaintiffs had owned the whole of the claim? If it could, then the statute declares it may be maintained now in the same manner as

then. The form of action may be the same in the one case as in the other. If plaintiffs were the owners of the whole claim, they could, upon the facts proved and admitted to exist, maintain this action as against a stranger.

These principles were well expressed by the Supreme Court of Illinois in interpreting a statute identical with Section 592, with the exception that the remedy was restricted, as it was in Montana prior to July 1, 1895, to an action of trover or trespass. (*Boyle* v. *Levings*, 28 Ill. 316.) This court, in *Anaconda Copper Mining Co.* v. *Butte & Boston Mining Co.*, 17 Mont. 519, 43 Pac. 924, has enunciated an interpretation of Section 592, the principle of which controls this case.

At page 527, 17 Mont., and page 927, 43 Pac., the court said: "How does he have this action, and what action may he have? He has it 'in the same manner as he would have if such joint tenancy or tenancy in common did not exist.' Now, exclude from the mind the idea and the fact of joint tenancy or tenancy in common. The statute puts them out of the way, and says, 'The party shall have his action,' as if they did not exist. Therefore we have this situation: The defendant in this case, with no joint relations to the plaintiff, goes upon the plaintiff's property, and assumes and exercises exclusive ownership over it, works it in its own manner, subject to its own approval only, takes the ore from the same by its own methods, and plaintiff sees its own property being used and consumed against its will and consent. Having, by reason of the statute, gotten the question of joint tenancy and tenancy in common out of the way, we are of opinion that it cannot be questioned that the injunction would lie; and we are of opinion that the statute intended that it should, and that for a plaintiff in the position of this one, having any appropriate remedy to enforce its rights, injunction is an appropriate remedy." The court further said: "We do not hold that taking out the ore would be waste, but we do hold that at least it would be a use which consumes, and the only adequate remedy against the dangers to plaintiff of such a use is injunction."

The reasoning of this case was approved in *Red Mountain Consolidated Mining Co.* v. *Esler*, 18 Mont. 174, 44 Pac. 523, and *Connole* v. *Boston and Montana Mining Co.*, 20 Mont. 523, 52 Pac. 263. In the latter case this court said that the provisions of Section 592, as interpreted by the court in the *Anaconda Copper Mining Co.* case, *supra*, conferred upon a tenant in common the right to an injunction against a co-tenant who assumes and exercises exclusive ownership over or takes away, destroys, lessens in value, or otherwise injures the property, whenever he would have such right as against a stranger to the subject of common ownership.

But defendant insists that he was entitled to show that his work enhanced the value of the claim, and that he was working in a shaft which he had sunk in 1885, with the consent of the persons who then owned the claim. The latter offer was of irrelevant testimony; and, however important might be evidence establishing that his operations gave the claim added value were an accounting decreed, we are unable to perceive upon what theory such proof would be material in considering whether defendant should be enjoined from taking away the common property, and from assuming and exercising exclusive ownership over part of such property. The evidence tendered would certainly be inadmissible if the defendant had no interest in the claim, and plaintiffs were the owners of the entire property. Since plaintiffs would have the remedy by injunction as against defendant were he not a co-tenant, they have it, by virtue of Section 592, despite such relationship.

Under the provisions of Section 592, and upon the principles announced in former decisions of this court, we are constrained to hold that owners of interests in a lode mining claim are entitled to an injunction against a co-owner prosecuting development work without their consent, restraining him from extracting, milling or disposing of the ore of the common property. It may be argued that a different doctrine, resting upon other principles, is to be applied to cases where the annual labor required, commonly spoken of as "representation work," is being performed by one co-tenant without the con-

sent of the others; but that question is not presented or suggested. Such distinction may exist. We express no opinion upon the subject. If inconvenience or hardship in particular instances be occasioned by enforcing the provisions of Section 592, the legislature, which alone can change the written law, must be looked to for relief.

Finding no error in the record, the judgment and order appealed from are affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

THE STATE OF MONTANA EX REL. STATE PUBLISHING CO., RELATOR, v. ROBERT B. SMITH AND OTHERS CONSTITUTING THE STATE FURNISHING BOARD OF THE STATE OF MONTANA, RESPONDENTS.

[Submitted March 29, 1898. Decided April 4, 1898.]

In an advertisement for bids for furnishing supplies for state officers, a detailed description of the goods were given; there were two bidders; as to some of the articles, the relator bid lower, and as to others his bid was higher than that of his competitor; the advertisement also provided that in case a greater quantity of any article should be needed than was specified, they should be delivered at the prices mentioned in the bid; the difference in the bids was exceedingly small, and it was impossible to tell the exact quantities which would be needed of those articles in regard to which the two bids differed. *Held*, that the evidence did not show that the state board had abused its discretion in determining which was the lowest responsible bid.

MANDAMUS by the State, on the relation of the State Publishing Company, to Robert B. Smith and others, constituting the State Furnishing Board of the State of Montana. Writ denied.

Walsh & Newman, for Relator.

C. B. Nolan, Attorney General, and *Cullen, Day & Cullen*, for Respondents.

PEMBERTON, C. J.—This is an application for a writ of *mandamus*. From the affidavit of the relator it appears that on the 15th day of November, 1897, the Secretary of State, in compliance with a resolution of the defendant board, advertised for proposals for furnishing certain supplies for the state officers. In pursuance of such advertisement, the relator made and submitted a bid for furnishing the supplies in question. It is alleged that the Independent Publishing Company also bid for the furnishing of such supplies. In the advertisement for bids, the supplies wanted by the board are all described in detail. The bid of the Independent Publishing Company is for the very supplies specifically described in the advertisement. The bid of the relator does not with exact particularity name the same supplies described in the advertisement for bids. This discrepancy, it is shown, caused some confusion when the board came to pass upon the bids. It is also shown by the affidavit that additional supplies, like those advertised for, were to be furnished from time to time in such quantities as might be required by the board during the fiscal year, at the prices named in the accepted bid or proposal. The Independent Publishing Company's bid for the supplies named in the advertisement amounted to $735.30. The relator contends that its bid for furnishing the supplies in question was in fact $715.42, being $19.88 less than the Independent Publishing Company's bid. Yet it is shown by the affidavit of the relator herein that the clerk of the defendant board was required to prepare a comparative statement of the two bids mentioned above, and that, according to such statement, the relator's bid was $727.36. The board awarded the contract for furnishing the supplies to the Independent Publishing Company, and relator instituted this proceeding for a writ of mandate to require the board to reassemble and award such contract to it, claiming to be the lowest responsible bidder therefor, and to revoke the award of the contract to the successful bidder.

The responsibility of both bidders is admitted. The question for decision before the board was, which is the lower bid?

An inspection of the proposals or bids for furnishing the supplies in question shows that some of the articles are offered at a lower figure by the Independent Publishing Company than by the relator, and *vice versa.* So that, if the supplies of like kind to be furnished from time to time by the contractor should be largely composed of those articles which the Independent Publishing Company offers at a lower figure than the relator does, we cannot tell whether the relator is in fact the lower bidder of the two. We could not determine this unless we knew what kind of supplies, and how much of like kind, would have to be furnished by the contractor during the year other than those included in the bid. Without this showing, which is not made, we cannot say that the relator was in this case the "lowest responsible bidder" for the supplies in question. The bid was not only for the supplies named in the advertisement, but for supplies of like kind to be delivered as required by the board during the fiscal year. According to the relator's estimate, there was only a difference of $19.88 in the two bids in question. On account of the evident uncertainty as to which was the lower of the two bids, as shown by the comparative statement thereof of the clerk, and a failure to show how many supplies like those named in the advertisement and bids would have to be furnished during the year, we are unable to conclude that the board abused its rightful discretion in determining the question as to which of the two bids was the lower and for the better interest of the state. (See *State ex rel. Eaves* v. *Rickards*, 16 Mont. 145, 40 Pac 210.) The board had a right to exercise a reasonable discretion in determining which of the two bids was the lower, and we are not able to discover from the showing made by the relator any support for the allegation that the board acted in bad faith in the premises. The writ is denied.

HUNT and PIGOTT, JJ., concur.

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IN THE MATTER OF THE DISBARMENT OF JOHN BLOOR.

[Submitted April 1, 1898. Decided April 11, 1898.]

Section 402 of the Code of Civil Procedure, provides that an attorney may be removed when he has been convicted of a felony or misdemeanor involving moral terpitude, and that in such a case the record of conviction shall be conclusive evidence; Section 417, *Id.*, provides that, when an attorney has been convicted of such a crime, the Clerk of the Court shall, within thirty days thereafter, transmit to the Supreme Court, a certified copy of the record of conviction; Section 418 provides that, in such cases, the proceedings to remove must be taken by the Supreme Court upon receipt of the certified copy of the record; in the case under review the attorney had been found guilty of the crime of secreting a public record which is a felony. *Held*, that it was not necessary to file any complaint, or to issue or serve any citation in the proceeding.

PROCEEDING for the disbarment of John Bloor. Judgment of disbarment.

C. B. Nolan, for the State.

T. J. Walsh, for Respondent.

PER CURIAM.—The respondent, John Bloor, was convicted of a felony. The conviction was sustained by the court on Bloor's appeal. (See *State* v. *Bloor*, 20 Mont. 574, 52 Pac. 611. After the remittitur from this court was forwarded to the District Court of the First Judicial District in and for Lewis and Clarke county, in which respondent was convicted, the clerk of said District Court, pursuant to the provisons of Section 417 of the Code of Civil Procedure, transmitted to this court a certified copy of the record of conviction. The respondent's counsel now before this court objects to our jurisdiction because no complaint or accusation has ever been filed as a basis for a proceeding to disbar said Bloor, and because the citation issued herein to said Bloor is not styled "The State of Montana," as required by the constitution.

We believe no complaint or accusation in writing is necessary where an attorney and counselor has been convicted of a felony, or a misdemeanor involving moral terpitude, and where the record of conviction has been duly certified to this

court. We also think that it is not necessary to issue or serve any citation upon an attorney or counselor, of proceedings to disbar him, where he has been convicted of a felony, or a misdemeanor involving moral turpitude, and where the record of his conviction has been duly certified to this court, before this court acts, where such record is the basis of the disbarment proceedings. It is the bounden duty of such attorney, so convicted, to know that the legal consequence of his conviction is his disbarment. There is no discretion in the Supreme Court, for it must proceed, under Section 418 of the Code of Civil Procedure, on receipt of a certified copy of the record of conviction, and by Section 402, Id., the record of conviction is conclusive evidence.

In some cases, upon the record certified to this court, perhaps the question may arise whether or not the offense of which the attorney has been convicted involves moral terpitude or not, but in the present instance it so clearly does that it admits of no argument to the contrary.

Let judgment be entered pursuant to Section 428 of the Code of Civil Procedure.

THE STATE OF MONTANA, RESPONDENT, v. THE THOMAS CRUSE SAVINGS BANK, APPELLANT.

[Submitted March 24, 1898. Decided April 11, 1898.]

Section 4061 of the Political Code, which imposes a license upon banks and banking institutions doing business in this state, does not conflict with Section 11 of Article 15 of the State Constitution, which provides that "no [company or corporation formed under any other country, state or territory, shall have, or be allowed to exercise or enjoy within this state any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of the state," although national banks are not subject to the license.

Appeal from District Court, Lewis and Clarke County. S. H. McIntire, Judge.

ACTION by the State against the Thomas Cruse Savings

Bank. Judgment for plaintiff, and defendant appeals. Affirmed.

Statement of the case by the justice delivering the opinion.

The defendant is a corporation engaged in the banking business in the City of Helena. This action is brought to recover of the defendant the sum of $800, alleged to be due for license under the provisions of Section 4061 of the Political Code, which imposes upon banks and banking institutions a license for carrying on such business in this state.

The answer avers that the defendant is not subject to the imposition and payment of the license claimed in this suit under the statute aforesaid, for the reason that national banks organized under the laws of the United States, during all the time for which said license is claimed were, and still are, doing a like business as that carried on by the defendant, in competition with the defendant, and which said national banks were not and are not subject to the payment of such license under the law imposing the license upon this defendant.

The defendant claims that the law imposing a license upon it in this case is void, and of no binding force and effect, because it is in conflict with Section 11, Article 15 of the constitution of the state, which is as follows:

"No foreign corporation shall do any business in this state without having one or more known places of business, and an authorized agent or agents in the same, upon whom process may be served. And no company or corporation formed under the laws of any other country, state or territory, shall have, or be allowed to exercise, or enjoy within this state any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of the state."

The plaintiff filed a general demurrer to the answer, which demurrer having been sustained by the court, and the defendant declining to further plead, judgment was rendered against it in accordance with the prayer of the complaint, from which judgment the defendant appeals.

T. J. Walsh, for Appellant.

C. B. Nolan, for the State.

PEMBERTON, C. J.—It is conceded that national banks cannot be required, under the section of our code referred to in the statement, to pay the license imposed by such section upon the defendant. It is, therefore, contended by counsel that national banks are corporations "formed under the laws of another country, state or territory," within the contemplation of Section 11, Article 15 of the constitution of the state; and that, as such corporations may do business in this state without being liable for the license imposed by said section of the code upon the defendant, the section of the statute in question is void, because, in violation of said section of the constitution of the state, it allows national banks, which are organized under the laws of the United States, "to exercise or enjoy within this state greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of the state." It is claimed by counsel that the statute of the state imposing this license discriminates in favor of national banks and against the defendant, and is, therefore, in conflict with the clause of the state constitution quoted above.

It is not denied, and in view of the authorities it cannot be questioned at this late day, that national banks are necessary agencies and "instruments designed to be used to aid the general government in the administration of an important branch of the public service. They are means appropriate to that end." (*Farmers' Nat. Bank* v. *Dearing*, 91 U. S. 29; *National Commercial Bank of Mobile* v. *Mayor, etc., of City of Mobile*, 62 Ala. 284; *McCulloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *Bank*, 9 Wheat. 740; 1 Desty on Taxation, page 75; Cooley on Taxation (2d Ed.) page 83.) The question is, then, can the state tax such agencies of the general government, and, if so, what is the extent of the power of the state to tax them?

In *McCulloch* v. *Maryland*, 4 Wheat. 416, Chief Justice Marshall, speaking of the power of a state to tax national banks, said: "It may be objected to this definition that the power of taxation is not confined to the people and property of a state. It may be exercised upon every object brought within its jurisdiction. This is true. But to what source do we trace this right? It is obvious that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends are objects of taxation, but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident."

The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them.

"If we measure the power of taxation residing in a state by the extent of sovereignty which the people of a single state possess and can confer on its government, we have an intelligible standard applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired, which leaves to a state the command of all its resources, and which places beyond its reach all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from

interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power? The attempt to use it on the means employed by the government of the Union, in pursuance of the constitution is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give."

"We find then, on just theory, a total failure of this original right to tax the means employed by the government of the Union for the execution of its powers. The right never existed, and the question whether it has been surrendered cannot arise."

In *Weston* v. *City of Charleston*, 2 Pet. 171, this great jurist, reaffirming the doctrine so forcibly expressed in *McCulloch* v. *Maryland*, summarizes his views of this important question as follows: "This subject was brought before the court in the case of *McCulloch* v. *Maryland*, 4 Wheat. 316, when it was thoroughly argued, and deliberately considered. The question decided in that case bears a near resemblance to that which is involved in this. It was discussed at the bar in all its relations, and examined by the court with its utmost attention. We will not repeat the reasoning which conducted us to the conclusion thus formed; but that conclusion was that 'all subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation.' 'The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission,' but not 'to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States.' 'The attempt to use' the power of taxation 'on the means employed by the government of the Union in pursuance of the constitution, is itself an abuse, because it

is the usurpation of a power which the people of a single state cannot give.' The court said in that case that 'the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operation of the constitutional laws enacted by congress, to carry into execution the powers vested in the general government.' We retain the opinions which were then expressed."

The doctrine announced by the great Marshall in those cases has been followed by the courts of this country, both federal and state, down to the present time, and may now be considered so well settled as not to admit of argument. (1 Desty on Taxation, 75; Cooley on Taxation (2d Ed.) 82 *et seq.*, and authorities cited in the notes.)

Now, then, if national banks are corporations formed under the laws of another country, state, or territory, as claimed by the defendant, and are agencies of the general government, designed to be used to aid it in the administration of an important branch of the public service, and as such agencies cannot be taxed by the state except in so far as congress shall expressly permit, does it follow that the law imposing the license on the defendant in this case, and not on national banks, is in conflict with Section 11, Article 15, of the constitution of the state?

This clause of the constitution, it is conceded, was intended to prevent discrimination by the legislature in favor of foreign corporations against corporations created under the laws of the state. But what corporations did the framers of the constitution have in view when they used the words in this clause, "corporations formed under the laws of any other country, state or territory?" They certainly had in contemplation those corporations "over which the sovereign power of a state extends." They could not have had in contemplation those companies, corporations and agencies organized by the general government for government purposes, which the sovereign power of the state had no authority to tax except by special permission of congress. The framers of the constitution were not ignorant of the principles underlying our system of gov-

ernment. They knew that a law of the federal government, constitutionally enacted, was the supreme law of the land, and was binding upon the constitutional convention as well as the legislature of the state. They adopted this clause of the constitution, having in view such corporations as might exist by authority of the state, or might be introduced into the state by its permission. National banks are not such corporations. They are organized by the general government to aid in the administration of an important branch of government. They are established and authorized to do business in the state, not with the permission of, but in spite of, the state, and are not subject to the laws or constitution of the state in the transaction of their business, and cannot be taxed upon their property, except as congress may expressly permit. If the clause of the state constitution and the statute in question had both provided in express terms that national banks should pay a license, like banking corporations created under the laws of the state, to entitle them to do business in the state, then, without doubt, both such clause and statute would have been null and void in that respect, because both would have been in conflict with the laws of congress in relation to such federal agencies.

We cannot agree with counsel that the law imposing the obligation upon the defendant in this case to pay a license to enable it to carry on its business in the state, without imposing the same duty on national banks, thereby discriminates in favor of the latter corporation. Legislative discrimination between corporations, persons, or things, occurs when all of such subjects of legislation exist by authority of, or are introduced into the state by its permission, and are, consequently, rightful subjects of the sovereign control or power of the state. The legislature cannot legally, or in legal contemplation, discriminate for or against a class of persons, corporations, or property, unless such subjects are all within the sovereign power of the state for legislative purposes. National banks, for the reasons given above, are such governmental agencies as do not come within the sovereign power of the state for legislative purposes, except in so far as congress has expressly

permitted. Being such governmental agencies, national banks cannot be held to be "of the same or similar character" as the defendant corporation and banking corporations created under the laws of the state. The rule announced in the case of *Criswell* v. *Montana Central Railway Co.*, 18 Mont. 167, 44 Pac. 525, is inapplicable to this case.

Counsel for defendant contends that, if national banks are exempt, under the law, from the license tax imposed upon defendant because they are federal agencies, then the Northern Pacific Railroad Company, being a federal instrumentality, is also exempt from state taxation. The right of the state to tax the property of railroads incorporated by congress is well settled by the courts. In the cases holding that national banks are federal agencies, or means designed to aid in the administration of an important branch of government, it is not held that the property of such institutions may not be taxed by the state. In *McCulloch* v. *Maryland* it was held that the tax "was not upon the property of the bank, but upon one of its operations; in fact, upon its right to exist. It was a direct impediment in the way of a governmental operation performed through the bank as an agent. It was a very different thing, both in its nature and effect, from a tax on the property of the bank. It was a tax on the operations of the bank, and is, consequently, a tax on the operations of an instrument employed by the government of the Union to carry its powers into execution." (*Railroad Co.* v. *Peniston*, 18 Wall. 5; *Osborn* v. *Bank*, 9 Wheat. 740.)

In *Railroad Co.* v. *Peniston*, the court said: "It is, therefore, manifest that exemption of federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does, in truth, deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform.

A tax upon their operations is a direct obstruction to the exercise of federal powers.''

Judge Cooley says: ''The mere fact that a corporation receives its charter and pecuniary or other aid from the United States does not fix its character as a federal agency, nor does the fact that the United States sometimes makes use of it for its purposes, as it might of a similar convenience brought into existence in some other way. And a state may tax the property of federal agencies with other property in the state, and as other property is taxed, when no law of congress forbids, and when the effect of the taxation will not be to defeat or hinder the operations of the national government.'' (Cooley on Taxation (2d Ed.) 85.) ''At any rate, the Supreme Court of the United States has settled the question that national banks cannot be taxed by a state except in so far as congress has expressly permitted, and that the property of railroad companies organized and incorporated by congress may be taxed by the state.'' (Cooley on Taxation, 85, and notes.)

We are unable to agree with the contention of counsel that the statute imposing a license on the defendant corporation and like corporations created under the laws of the state is in conflict with the article of the constitution of the state invoked in this controversy, because it does not impose a like liability upon national banks.

We cannot agree with the argument that the license law of the state, imposing liabilities upon corporations created under the laws of the state, is unconstitutional and void because it does not impose like liabilities and burdens upon certain designated agencies of the general government over which the state has no sovereign power. Because the state has no power to burden the necessary governmental agencies with a license tax is no reason why it may not impose such liability upon corporations, companies, or persons within the sphere of its power, because they are within the state by virtue of its laws or its permission.

The judgment appealed from is affirmed.

Affirmed.

Hunt, J., concurs.

Pigott, J. I concur in the result announced in the foregoing opinion.

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37 151

MONTANA COAL AND COKE COMPANY, Appellant, *v.* ALEXANDER LIVINGSTON, TREASURER OF PARK COUNTY, Respondent.

[Submitted March 28, 1898. Decided April 11, 1898.]

Taxation—Net Proceeds of Coal Mines—Constitution—Interpretation of.

1. Taxation—*Net Proceeds of Coal Mines.*—The annual net proceeds of coal mines acquired under the laws of the United States relative to the acquisition of coal lands, are subject to taxation under Section 8, Article 12 of the State Constitution, and Section 3672 and Section 3760 *et seq.* of the Political Code.
2. Constitution—*Interpretation of.*—In interpreting the Constitution, effect must, if possible, be given to every section and clause.

Appeal from District Court, Park County, Frank Henry, Judge.

Application by Montana Coal & Coke Company, a corporation, against Alexander Livingston, treasurer of Park county, Montana, for injunction. The injunction was denied and plaintiff appeals. Affirmed.

Cullen, Day & Cullen, for Appellant.

We contend that the assessment of net proceeds of the property of the plaintiff in this proceeding is illegal, (1) for the reason that it is unauthorized by the acts of the legislature, and (2) if the acts of the legislature be construed to authorize such an assessment, they are unconstitutional. Section 3672 of the Political Code, which is a part of Chapter I, Title X., Part III, of the Political Code, entitled "Property liable to taxation," provides that "the annual net proceeds of all mines and mining claims shall be taxed as other personal

property." Section 3760 of the Political Code, which is a portion of Chapter IV, of Title X, and is entitled "Assessment of Net Proceeds of Mines," provides that "Every person, corporation or association engaged in mining upon any quartz vein or lode or placer mining claim containing gold, silver, copper, coal, lead or other valuable mineral deposits, must, between the first and tenth day of June of each year, make out a statement of the gross yield of the above named metals or minerals, from each mine owned or worked by such person, corporation or association, during the year preceding the first day of June, and the value thereof." Then follows in the succeeding sections provisions for deducting from such gross yield, the cost of extracting, transporting and reducing the ore or mineral taken from said mines, and the net proceeds so established form the basis of the assessment. It seems to us that the language of this section is so plain and definite that there can be no controversy about its meaning; that these provisions are made applicable only to persons engaged in mining upon quartz lodes or placer claims, and by the express admission of the pleadings in this case the plaintiff is not engaged in such business. The net proceeds of plaintiff's business, if they can be assessed at all, must be assessed in compliance with the law relative to the assessment of "other personal property," as provided in Section 3672, which other personal property is to be assessed with reference to its ownership and situation on the first Monday in March of each year. (Political Code, Section 3700.)

But we do not believe that the net proceeds of the business of persons engaged in mining for coal are the subject of taxation as a separate class, but that the net proceeds, together with the other personal property of the corporation, are to be taxed as the property of the corporation at a uniform rate of assessment and taxation. The Constitution provides, in Article XII, Section 3, as follows: "All mines and mining claims, both placer and rock in place, containing or bearing gold, silver, copper, lead, coal or other valuable mineral deposits, after purchase thereof from the United States, shall be taxed

at the price paid the United States therefor, unless the surface ground, or some part thereof, of such mine or claim, is used for other than mining purposes, and has a separate and independent value for such other purposes, in which case said surface ground, or any part thereof, so used for other than mining purposes, shall be taxed at its value for such other purposes, as provided by law; and all machinery used in mining, and property and surface improvements upon or appurtenant to mines, and mining claims which have a value separate and independent of such mines or mining claims, and the annual net proceeds of all mines and mining claims shall be taxed as provided by law." It will be noticed that this provision starts out with the proposition that "All mines and mining claims" shall be taxed; then follows a limitation, "both placer and rock in place," accompanied by a further limitation, "containing or bearing gold, silver, etc." The terms "Mines and mining claims" at the time of the adoption of the constitution were terms in common use which had a clearly defined and well established meaning.

Mr. Justice Miller, in *Forbes* v. *Gracey*, 94 U. S. 762, affirming the same case, Fed. Cases 4924, had said that the term "mines" referred to the title to the soil which the owner held after he had obtained a patent from the United States under the provisions of the Mineral Lands Act; while the term "mining claims" referred to the possessory right by which the owner held and worked the soil prior to obtaining that patent. Thus these two terms describe the character or extent of the ownership. The terms "placer and rock in place" were equally well known and had an equally clearly defined and well established meaning given them by the laws of the United States as well as by custom. These terms referred to the character of the mineral contained in the mines or mining claims. The insertion of the word "coal" in the constitutional provision gives to these other terms no additional meaning, nor can it operate in any way to extend them. Prior to 1864 coal was not even considered a mineral within the meaning of the land laws of the United States, but by a statutory enact-

ment in that year, coal lands were declared to be mineral lands within the meaning of the pre-emption act, and were thus distinguished from agricultural lands, and it is by virtue of this statutory declaration that coal lands have ever been held to be mineral lands. (*U. S.* v. *Mullen*, 118 U. S., 271; affirmed 10 Fed. 785.) But whether mineral or not, they have never been included in the term as applied to quartz and placer claims. And the title to coal lands is obtained through a different procedure. (Revised Statutes of U. S., Title 32, Chapter 6.) The use of the modifying phrase "both placer and rock in place" at the beginning of the section of the constitution limits the terms "mines and mining claims" as used in the subsequent portion of the section to mines and mining claims of the class designated as placer and rock in place. The word "both" here is a word of exclusion. It is a thoroughly well settled rule of construction that when general terms are used and the statute enumerates the particulars under a *videlicit*, it shows the intention of the legislature to limit the comprehensiveness of the general phraseology to the particulars enumerated and those of the same class and the general terms of the section will be held to refer to those of the class particularized. (Black on International Law, Section 6163. *U. S.* v. *Wesie*, Fed. Cas. 16659.) No objection was made in the court below to the proceedings upon the ground of plaintiff's possessing an adequate remedy at law. If, however, the court should have any doubt upon the question as to our right to an injunction, we would submit that under the provisions of Section 3768 of the Political Code, the tax levied for these net proceeds is declared to be a lien upon the mining claims from which the ores are mined or extracted, and under the provisions of Section 3897, the treasurer's deed will be *prima facie* evidence that the property is lawfully assessed and that the taxes were levied in accordance with law. This would constitute a cloud upon the title of the plaintiff and it is well settled that equity will intervene to prevent a cloud upon the title where the tax is illegal. The fact that the law also provides a remedy by payment of taxes under protest in an action

to recover the same back, does not oust the equitable jurisdiction. These propositions are thoroughly discussed and settled in a late case by Judge Knowles in the Federal Circuit Court involving the consideration of the statute here in controversy. (*Brown* v. *French*, 80 Fed., 166.)

C. B. Nolan, Attorney General, and *W. H. Poorman*, Attorney for Park County, for Respondent.

Section 16, Article XII, of the Constitution, provides that "All property shall be assessed in the manner prescribed by law except as is otherwise provided in this constitution." Section 18, of the same article, provides that "The Legislative Assembly shall pass all laws necessary to carry out the provisions of this article." Counsel also cites Section 3, (found in appellant's brief). As directed by the constitution, the Legislative Assembly provided as follows: "All mines and mining claims, both placer and rock in place, containing or bearing gold, silver, copper, lead, coal, or other valuable mineral deposits, after purchase thereof from the United States, shall be taxed at the price paid the United States therefor, unless the surface ground, or some part thereof, of such mine or claim is used for other than mining purposes, and has a separate and independent value for such other purposes, in which case said surface ground, or any part thereof, so used for other than mining purposes shall be taxed at its full value for such other purposes; and all machinery used in mining and all property and surface improvements upon or appurtenant to mines and mining claims which have a value separate and independent of such mines or mining claims, and the annual net proceeds of all mines and mining claims shall be taxed as other personal property." (Section 3672, Political Code.) Sections 3760 to 3768, inclusive, of the Political Code, contain specific directions as to how the assessment shall be made and the tax collected. The appellant contends that if the net proceeds of coal mines can be assessed at all, they must be assessed as other personal property, and that coal mines are not included in the terms, "mines and mining"

claims, as used in the sections of the Constitution and Political Code above referred to. The power of the legislature to classify property for assessment and taxation, except when expressly limited by constitutional provisions, is too well established to require the citation of authorities. It will be observed that Section 3672, *supra*, provides that "the annual net proceeds of all mines and mining claims shall be taxed as other personal property." The assessment of the net proceeds of mines, however, is regulated by Section 3760 *et seq.* It is nowhere provided that they shall be assessed as other personal property, and we submit that the contention of appellant that they should have been assessed in that manner is without merit. As to the contention of appellant that coal mines are not included in the terms "mines and mining claims," it has been repeatedly held by the Department of the Interior and the Supreme Court of the United States that coal lands are mineral lands. Coal lands are mineral lands, and as such are excluded from pre-emption and homestead claims. (*Townsite of Coalville*, 4 General Land Office, 46.) Coal lands are mineral lands, and are to be acquired only under laws specifically applicable thereto. (*Mullin* v. *United States*, 118 U. S., 271, affirming *United States* v. *Mullin*, 7 Sawyer, 466.) It is immaterial at what date coal was first classed as a mineral. It was so classed and recognized at the time the constitution and statute were adopted. The term "coal mines" is frequently used in the codes. (Sections 3350 to 3372, Political Code.)

Section 3, Article XII, of the Constitution, *supra*, provides for the taxation of three classes of property, (1) the taxation of the surface ground of mining claims; (2) the taxation of mining machinery and implements; (3) the taxation of the annual net proceeds of all mines and mining claims.

If there is any force at all in the contention of the appellant, it is limited to the taxation of the surface ground of mining claims, for it will be noticed that in providing for the taxation of the net proceeds all mines and mining claims are included. The first part of the section in question relates to the taxation of the surface ground of all mines and mining

claims, and it is in this connection only that the clause "both placer and rock in place" is used. The clause "both placer and rock in place" is explanatory, and not a modification. It is reasonable to presume that this clause was inserted for the purpose of explaining—not limiting—that which goes before it, and of showing that the phrase, "all mines and mining claims," preceding it included quartz lode and placer mining claims, as well as all other mines and mining claims. This construction is supported by the fact that the section in question specifically mentions gold, silver, copper, lead, coal and other valuable mineral deposits, although coal is not the product of what are commonly understood as quartz lode and placer mining claims. If the framers of the constitution meant to include only this class of claims, why did they not use those terms instead of "all mines and mining claims," and why did they make specific mention of products that are never found in quartz lode and placer mines? All mineral products were included. The section specifically mentions some and then adds, "or other valuable mineral deposits." The last clause of the section, providing for the taxation of the net proceeds of "all mines and mining claims," is an independent provision, preceded by a co-ordinate connective, and has nothing to do with the clause, "both placer and rock in place." It applies indiscriminately to the product of all mines, and as coal is a product of a "mine," it necessarily follows that it is within the meaning of this constitutional provision. Taxation is the rule, and exemption the exception, and it would be hard to give a reason, under this constitutional provision and the code provisions, *supra*, why one mineral product should be taxed and not another. Both the constitution and the Code make specific mention of "coal" as a proper mineral product for taxation, and if it was not meant that it should be taxed in this way, why was it so specified? Nor does the phrase "rock in place" necessarily apply only to quartz lode claims. Rock in place is any stratified rock that has not been removed from the place of its formation, and it is applicable to coal mines as it is to any other mine. In Lindley on Mines, Section 323,

the following language is found: "It may be said that ordinarily nothing but metalliferous ores are encountered in rock in place. There are, however, exceptions to this rule. Coal occurs in many instances with as pronounced dip and strike as in the auriferous quartz lode." (See also, Id. Sections 299, 300 and 301.)

A legislative construction has been placed upon mineral claims by Section 3672 of the Political Code, and as that section and Section 3760 *et seq.* are practically the same as the section of the constitution above referred to, the discussion of the constitution applied with equal force to the statute. ' In the case of a doubtful or ambiguous law, the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect, and ought not to be overruled without cogent reasons." (*United States* v. *Moore*, 95 U. S., 760; *Brown* v. *United States*, 113 U. S., 568; *Barden* v. *N. P. R. R.*, 154 U. S., 328.)

HUNT, J. Injunction. Plaintiff's application for an injunction restraining the sale of certain coal properties for non-payment of taxes was denied. Plaintiff appeals.

Plaintiff's business is mining for coal and manufacturing the same into coke. Part of the coal lands described was plaintiff's by purchase from the United States under the land laws of the United States relative to the acquisition of coal lands; part was leased from the Northern Pacific Railroad Company, the said railroad company being the owner of such part by virtue of its land grant from the United States.

The appellant's counsel has presented to the court in his brief and oral argument but a single point, which may be stated in the following language: Are the annual net proceeds of coal mines and mining claims, acquired under the laws of the United States relative to the acquisition of coal lands, taxable by the constitution and laws of the state providing for the assessment of the net proceeds of mines?

Section 3, Article 12, of the constitution of the state, is as follows: "All mines and mining claims, both placer and rock

in place, containing or bearing gold, silver, copper, lead, coal, or other valuable mineral deposits, after purchase thereof from the United States, shall be taxed at the price paid the United States therefor, unless the surface ground, or some part thereof, of such mine or claim, is used for other than mining purposes, and has a separate and independent value for such other purposes, in which case said surface ground, or any part thereof, so used for other than mining purposes, shall be taxed at its value for such other purposes, as provided by law; and all machinery used in mining, and all property and surface improvements upon or appurtenant to mines and mining claims which have a value separate and independent of such mines or mining claims, and the annual net proceeds of all mines and mining claims shall be taxed as provided by law."

The appellant's construction of the foregoing section is that the net proceeds of coal mines are not the subject of taxation as a separate class of property, but that such net proceeds, together with the other personal property of the corporation, must be taxed as the property of the corporation at a uniform ra e of assessment and taxation. That construction is too narrow. The principle of construction, as applied to a written constitution, is that effect must be given, if possible, to the whole instrument and to every section and clause.

Judge Cooley (Cooley on Constitution, Lim. page 72) says, concerning this rule: "If different portions seem to conflict, the courts must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative rather than one which may make some words idle and nugatory. This rule is applicable with special force to written constitutions, in which the people will be presumed to have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, leaving as little as possible to implication. It is scarcely conceivable that a case can arise where a court would be justified in declaring any portion of a written constitution nugatory because of ambiguity. One part may qualify another so as to restrict its operation, or apply it otherwise than the natural

construction would require if it stood by itself; but one part is not to be allowed to defeat another if by any reasonable construction the two can be made to stand together."

When guided by these rules, it becomes the duty of the judiciary to avoid any construction which will make the word "coal," used in the section quoted, idle and nugatory, or which will eliminate it from the context altogether.

Again, the subject of the whole section under consideration pertains to revenue and taxation necessary for the support of the state, and the object intended to be accomplished is the taxation of the net proceeds of any and all mines which contain valuable mineral deposits. Having collected this intention from the article and section referred to, we shall interpret the words used so as to avoid repugnancies or inconsistencies with such intention. (Sutherland on Statutory Construction § 218.)

Certainly coal is a mineral, classed as such generally, and especially so designated by the framers of the constitution, who authorized the taxation of mines and mining claims "containing or bearing gold, * * * copper, * * * coal or other valuable mineral deposits." Whether or not, from a scientific standpoint, coal is classed by geologists as placer or rock in place, is not of great importance; for we conclude that, in the absence of a constitutional definition of what is placer or what is rock in place—whether scientifically accurate or not, in our interpretation of these words—they must be here defined as sufficiently broad to include all mines and mining claims containing or bearing valuable mineral deposits of the several minerals mentioned in the section cited.

This construction is in accord with the doctrine that general terms of a constitution must receive that interpretation which will include all the instances enumerated as comprehended by them. Accordingly, the classification of valuable mineral deposits, made by the constitution for the purposes of taxation, puts coal as either rock in place or placer. Coal may be rock in place. Lindley on Mines, section 323, states that coal occurs in veins, and often with as pronounced a dip and strike as in the auriferous quartz lodes. And we should say

that coal is meant to be brought within the meaning of the words "rock in place," as used by the constitution; the term "placer," as defined by Judge Blake in *Moxon* v. *Wilkinson*, 2 Mont. 421, and as commonly regarded, being "a superficial deposit which occupies the bed of an ancient river or valley," or by geological authority a term applied to "the auriferous gravels of America."

We have an analogous instance in the classification of minerals by the acts of Congress relating to deposits of cinnabar. The acts of 1866 provided for patents to persons claiming "a vein or lode of quartz or other rock in place, bearing gold, cinnabar or copper"; and although cinnabar is not found in any "lode" or "fissure of the earth's crust," as defined by the geologists, yet it was decided by Judge Field in the Eureka Case, 4 Sawy. 302, Fed. Cas. No. 4,548, that any definition of "lode," as used in the act of Congress, which did not embrace deposits of cinnabar, "would be as defective as if it did not embrace deposits of gold or silver." "The definition of 'lode,'" wrote that learned judge, "must apply to deposits of all the metals named, if it apply to a deposit of any one of them. Those acts were not drawn by geologists or for geologists. They were not framed in the interests of science, and consequently with scientific accuracy in the use of terms. They were framed for the protection of miners in the claims which they had located and developed, and should receive such construction as will carry out this purpose. The use of the terms 'vein' and 'lode' in connection with each other in the act of 1866, and their use in connection with the term 'ledge' in the act of 1872, would seem to indicate that it was the object of the legislator to avoid any limitation in the application of the acts which a scientific definition of any one of these terms might impose." That decision bears directly upon the case before us, and the meaning there put upon the acts of Congress was based upon the same principle of construction applicable to the constitutional provision above cited. The limitations of very technical scientific definitions, if correctly invoked as being applicable to coal as rock in place or placer,

must therefore be avoided, and the annual net proceeds of coal mines and mining claims must be taxed as provided by law.

Passing, now, to the legislation upon the subject, we find Section 3672, Political Code, under the caption of "Property Liable to Taxation," to be a reiteration of the constitutional clause heretofore discussed, making the annual net proceeds of coal mines liable to taxation, and providing, also, that such net proceeds are to be taxed "as other personal property." Section 3760, and those sections which follow 3760, provide for the assessment of the net proceeds of mines and the manner of the collection of the tax. Section 3760 in detail requires "every person * * * engaged in mining upon any quartz vein or lode, or placer mining claim, containing gold, silver, copper, coal or other valuable mineral deposit," to make out a statement of the gross yield of the above-named "metals or minerals," etc. We are of the opinion that, under the same rules of construction which we applied to the constitutional section, persons engaged in mining upon "any quartz vein or lode or placer mining claim containing * * * coal" are just as liable to the duty of making the statement required by Section 3760 as are those engaged in mining gold or silver or copper. When the legislature adopted the code sections referred to pertaining to the assessment of the net proceeds of mines, they were dealing with the matter of the practical means of acqiring revenue for the state; and, by including coal miners as those engaged in mining upon quartz veins or lodes or placer mining claims, they classified such persons with relation to methods and conveniences in the assessment of the proceeds of coal mines, rather than by any standard of the scientific definitions of quartz veins or lodes or placer mining claims which were to be assessed. Uncertainties arising out of the meaning of the words "quartz" and "placer" must therefore be resolved before the easily ascertained and controlling intent, which was to include persons owning coal mines, and the net proceeds of such mines, as within the provisions of the statutes. (Eureka Case, *supra.*)

Our judgment is that the order appealed from be affirmed.

Affirmed.

PEMBERTON, C. J., and PIGOTT, J., concur.

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CALVIN E. HULL, APPELLANT, v. GEORGE B. DIEHL ET AL., RESPONDENTS.

[Submitted March 3, 1898. Decided April 18, 1898.]

Mortgage of Realty—Bona Fide Purchaser—Burden of Proof—Assignment of Mortgage—Recording—Priority.

1. **MORTGAGE**—*Bona Fide Purchaser—Burden of Proof.* After having executed a mortgage upon certain real estate to a bank, the owner conveyed the property to "D," who mortgaged the same to "W," who, for a valuable consideration and before maturity, indorsed the note secured by this mortgage to plaintiff and also assigned the mortgage to him. Both "D" and "W" knew of the mortgage to the bank, when they acquired their interest in the property. The mortgage to the bank was not recorded until after the deed to "D" and the mortgage to "W" had been recorded, and the transfer of the note and mortgage to plaintiff had been made; the assignment of the mortgage to plaintiff was never recorded. *Held*, that the burden was upon the bank to prove that plaintiff had notice of its unrecorded mortgage.

SAME—*Assignment—Recording—Priority.*—Under the facts above stated; *Held*, that under the Compiled Statutes of 1887, plaintiff could not record the assignment of the mortgage to him, as a mortgage of real estate is not a conveyance; and that his failure so to do did not destroy his priority.

SAME.—*Held*, further, that, granting that the assignment was entitled to record, the plaintiff being a purchaser for value and without notice of the mortgage first recorded, his right was prior to that of the bank, and that he was not bound by the actual notice of his assignor.

Appeal from District Court, Lewis and Clarke County; H. R. Buck, Judge.

ACTION by Calvin E. Hull against George B. Diehl and others. Judgment for defendants. Plaintiff appealed. Reversed.

McConnell, Clayberg and Gunn, for Appellant.

By the great weight of authority in this country the assignee of a negotiable promissory note secured by a real estate mortgage, who purchases such note for a valuable consideration, before maturity, takes such note and the mortgage securing the same free and clear of all equities and defenses. (*Carpenter* v. *Longan*, 16 Wall. 271; *Dulin* v. *Hunter*, 13 So. 301; Jones on Mortgages, §§ 834 and 1487; Beach's Equity Jurisprudence, § 464; *Webb* v. *Hoselton*, 19 Am. Rep. 638;

First National Bank v. *Rohrer*, 39 S. W. 1047; Pingrey on Mortgages, § 998.) In some states it is held that the assignee takes the mortgage subject to the defenses of the mortgagor, against the mortgagee, but not subject to equities in favor of third persons of which he had no notice. This is the rule in Illinois. (*Humble* v. *Curtis*, 43 N. E. 749; See also *Dulin* v. *Hunter*, 13 So. 301; Pingrey on Mortgages, § 1005.) In this case it appearing that the plaintiff purchased the notes and mortgages mentioned in the complaint for a valuable consideration and before the maturity of the notes, the presumption arises that he had no notice of the existence of the unrecorded mortgage to the bank. If the plaintiff had notice it constituted a matter of defense, and there being no allegation or proof of notice on the part of the plaintiff, he stands as a *bona fide* purchaser. (*Lacustrine Fer. Co.* v. *L. G. Co.*, 82 N. Y. 476; *Hiller* v. *Jones*, 66 Miss. 636; *Vest* v. *Michie*, 31 Am. Rep. 722; *Roll* v. *Rea*, 50 N. J. L. 264; *Anthony* v. *Wheeler*, 22 N. E. 494; *Wood* v. *Chapin*, 13 N. Y. 509.)

Section 260 of the Fifth Division of the Compiled Statutes of Montana reads as follows: "Every conveyance of real estate within this territory hereafter made which shall not be recorded as provided for in this chapter, shall be deemed void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate, or any portion thereof, where his own conveyance shall be first duly recorded." Section 270 reads as follows: "The term 'conveyance' as used in this chapter shall be construed to embrace every instrument in writing by which any real estate or interest in real estate is created, alienated, mortgaged or assigned, except wills, leases for a term not exceeding one year, and executory contracts for the sale or purchase of land." In this state "a mortgage is a security for a debt. It retains no life when the debt is extinguished. It creates no estate in real property." (*Gallatin Co.* v *Beattie*, 3 Mont. 175; See also *Holland* v. *Board of Co. Commrs. of Silver Bow Co.*, 15 Mont. 460.) In view of these decisions the assignment of a mortgage is not a conveyance within the meaning of Section 270 above quoted, and

the assignee of a mortgage is not a purchaser of real estate within the meaning of Section 260. At common law deeds and other conveyances were not required to be recorded, and the registry acts of the different states, being in derogation of the common law, will be strictly construed. Unless, therefore, the statutes expressly require an assignment of a mortgage to be recorded, such recording is unnecessary. (20 Am. and Eng. Enc. of Law, 532 and cases cited in note.) In the states of California and Oregon, under statutes fully as broad as the statute of this state on the subject of recording of instruments, it is held that such statutes do not authorize or require the recording of the assignment of a mortgage. (*Adler* v. *Newell*, 41 Pac. 799; *Bamberger* v. *Geiser*, 33 Pac. 609; *Oregon Trust Co.* v. *Shaw*, 5 Saw. 336.) We therefore insist that at the time of the assignment of the mortgages mentioned in the complaint to plaintiff there was no law in this state authorizing or requiring the recording of the assignment of a mortgage.

But if it should be held that under the Compiled Statutes it was necessary to record an assignment of a mortgage, still the situation and rights of the parties to this case were not affected by the failure of plaintiff to record the said assignments for the reason that the only purpose of the statute in providing for the recording of the assignment of a mortgage is to protect subsequent purchasers of the same mortgage. (*Curtis* v. *Moore*, 46 N. E. 168; *Gillig* v. *Maass*, 28 N. Y. 191; *Willcox* v. *Foster*, 132 Mass. 320; *Greene* v. *Warnick*, 64 N. Y. 220; *Crane* v. *Turner*, 67 N. Y. 437.)

Wm. Wallace, Jr., for Respondent.

Respondent was not attempting to gain priority against appellant by virtue of a subsequent equity; but appellant was striving to gain by this means a superior position to our prior lien. He concedes that Thornburgh, Diehl and Wallace all had notice, and that the mortgage he bought, though recorded, was, while in their hands, subject to ours, and he is striving, through his purchase, to gain a priority for the mortgage he

bought that it never before had. The question is then purely one of construction of our registry laws. In Montana, under the laws of 1887, then in force, our prior mortgage, though unrecorded, was valid as to all the world except a subsequent purchaser in good faith for value whose conveyance was first recorded. (Pingrey on Mortgages, § 617.) Appellant alleged and proved himself a subsequent purchaser for value, but wholly failed to allege or prove that he bought without notice, and did not record his assignment. Under a statute, such as ours, making the unrecorded mortgage good as to all the world, except a purchaser for value without notice, the burden was upon the appellant to allege and affirmatively prove that he stood in this particular category. (*Seymour* v. *McKinstry*, 106 N. Y., 230, 242; 54 Am. Dec., 287, 288, and many cases cited; § 3145 Code of Civil Procedure, Montana. Citing also *Decker* v. *Boice*, 83 N. Y., 219; Pingrey on Mortgages, §§ 660 and 1004; Jones on Corporate Bonds, § 170.) But as already shown, the question of the relation of an assignee of a mortgage to equities subsequent to that mortgage itself, is not the question in this case. The court below followed the New York authorities in construing our statutes, rather than those construing statutes such as are found in Kansas and Mississippi and some other states, and rightly followed the former line of authorities. These New York cases are as follows: *Seymour* v. *McKinstry*, 106 N. Y. 230, 242; *Brewster* v. *Carnes*, 103 N. Y., 562; *Bacon* v. *Shoonhoven*, 87 N. Y., 450; *Decker* v. *Boice*, 83 N. Y., 215; *Westerbrook* v. *Gleason*, 79 N. Y., 23. And the doctrine of the last of these cases, followed in all the latter ones, has been approved by Mr. Pomeroy. (2 Pomeroy on Equity Jurisprudence, 190, note.)

Necessity of recording assignment. Under this head appellant makes but one point: That the idea that a mortgage is a security simply, and does not create an interest in real property, forbids the idea that an assignment of the mortgage could pass an interest in realty. This is fully answered by the language of the court in *Decker* v. *Boice*, 83 N. Y., 219,

quoted by Mr. Justice Buck in his opinion; and the Oregon cases cited by counsel are to be distinguished, and were distinguished by Mr. Justice Buck, on the ground of the difference of the Oregon statute. The general rule is that "where the statutes themselves do not in terms directly apply to the assignment of mortgages, the courts have generally drawn the inference of intended application." (1 Jones on Mortgages, § 479; Pingrey on Mortgages, § 656.)

PIGOTT, J. On this appeal the only question presented is whether the mortgages, of which the plaintiff is assignee, are liens entitled to precedence over the mortgage lien of the defendant bank.

The material facts are admitted, and may be summarized as follows: On January 15, 1892, defendant Thornburgh, to secure the payment of his note for $12,155, executed to defendant First National Bank a mortgage upon certain city lots in Helena, Mont., then owned by him. The mortgage was not recorded until July 22, 1893. On April 9, 1892, Thornburgh conveyed the lots by warranty deed, dated March 1, 1892. to defendant Diehl, and this deed was recorded April 11, 1892; and on April 9, 1892, Diehl executed to one Wallace two mortgages on the lots to secure payment of a like number of negotiable promissory notes, each for $800. These mortgages were recorded April 11, 1892. Diehl and Wallace had knowledge of the mortgage to the bank at the time the mortgages last mentioned were made. On May 13, 1892, before their maturity, Wallace indorsed and assigned the Diehl notes and mortgages to the plaintiff, but no assignment of the mortgage was ever recorded. The district court adjudged the mortgage of January 15, 1892, from Thornburgh to the bank, a lien prior to the lien acquired by plaintiff under his assignment of the mortgages made by Diehl to Wallace in April, 1892. From the judgment and order refusing a new trial plaintiff appeals. The bank is the only respondent.

1. Appellant pleaded that he purchased the mortgages for a valuable consideration and without notice of the unrecorded

prior mortgage to respondent. It was both proved and admitted that he paid a valuable consideration, but there was no evidence establishing affirmatively that he was without actual knowledge of such prior mortgage. Respondent claims that the burden of proving want of notice was upon appellant, and that, in the absence of such proof, the later, but first recorded, mortgages assigned to him must yield to the prior, but last recorded, mortgage to respondent. In so far as pertinent to the question raised, Section 260 of the Fifth Division, Compiled Statutes of 1887, then in force, declares that an unrecorded conveyance shall be deemed void as against a subsequent purchaser in good faith and for a valuable consideration. It must be conceded that many respectable courts hold to the doctrine that a recorded deed or mortgage is *prima facie* evidence, as against one subsequently recorded, of every fact essential to its validity, including the payment of a valuable consideration as well as the existence of good faith in the purchaser. In the case of *Le Neve* v. *Le Neve*, Amb. 436, vol. 2 White & T. Lead. Cas. Eq. pt. 1, page 35, it was for the first time held "that a priority of record could be assailed in any court, and the doctrine has ever since been maintained that it may be done, but only by the most convincing proof of fraud by notice, or by want of consideration which raises a constructive fraud. Fraud is the only ground of interference, and it cannot be presumed. The doctrine which assumes this, without proof, is at war with all the recognized legal presumptions, and I cannot but regard it as dangerous and unreasonable." (Campbell, C. J., dissenting, in *Shotwell* v. *Harrison*, 22 Mich., at page 425.)

Whether the burden of proving the payment of a valuable consideration is upon the person claiming under a conveyance recorded before the record of a prior conveyance is not presented for decision in this case, and we express no opinion. We are, however, satisfied that the good faith of the purchaser will sufficiently appear by proof of the record of conveyances showing title in his grantor at the time of the purchase, upon which record he had the right to rely and is presumed to have

relied. If he had actual notice of the prior conveyance, "this is a fact affirmative in its nature, and it is therefore more reasonable to require it to be shown by the party claiming under the prior unrecorded deed than to call upon the purchaser to prove the negative." (*Shotwell* v. *Harrison*, 22 Mich. 410. See also *Eversdon* v. *Mayhew*, 85 Cal. 9, 21 Pac. 431, and 24 Pac. 382; *Nolan* v. *Grant*, 53 Iowa, 392, 15 N. W. 513; *Garber* v. *Gianella*, 98 Cal. 527, 33 Pac. 458; *Hiller* v. *Jones*, 66 Miss. 636, 6 South. 465; *Roll* v. *Rea*, 50 N. J. Law, 264, 12 Atl. 905.) We think this is the better rule, and therefore, on the record before us, and for the purposes of this appeal, it must be presumed that appellant purchased the mortgages in good faith.

2. Appellant claims that, under the statutes then in force, the mortgage made by Thornburgh to respondent was void as to the mortgages made by Diehl to Wallace at the time appellant acquired them in good faith and for value, for the reason that the prior mortgage was not then of record; that, when he purchased the notes secured by the mortgages, he presumably did and had the right to rely upon the records of the county which failed to give notice of the respondent's mortgage; and that the silence of the records was due to the laches and negligence of the respondent. But respondent meets this by insisting that the assignment of a mortgage is a conveyance within the meaning of the recording acts then in force, and that, in order to put himself in a position to take advantage of the law protecting an innocent purchaser against a prior unrecorded conveyance, appellant should have recorded the assignment before the respondent placed its mortgage on record. The appellant was the indorsee of underdue negotiable notes, the payment of which was secured by the mortgages assigned to him, and we have held that he was without knowledge of the prior mortgage by Thornburgh to respondent. Under these facts, respondent practically concedes that appellant should prevail unless the assignment of a mortgage is within the provisions of the recording acts. We note the following sections of the Fifth Division of the Compiled Statutes of 1887:

"Section 237. Every conveyance in writing whereby any real estate is conveyed, or may be affected, shall be acknowledged or proved and certified in the manner hereinafter provided."

"Section 270. The term 'conveyance' as used in this chapter shall be construed to embrace every instrument in writing by which any real estate, or interest in real estate, is created, alienated, mortgaged or assigned, except wills, leases for a term not exceeding one year, and executory contracts for the sale or purchase of lands."

"Section 258. Every conveyance of real estate, and every instrument of writing setting forth an agreement to convey any real estate, may be effected, proved, acknowledged and certified in the manner prescribed in this act to operate as notice to third persons, shall be recorded in the office of the recorder of the county in which such real estate is situated, but shall be valid and binding between the parties thereto without such record.

"Section 259. Every such conveyance and instrument in writing, acknowledged or proved and certified and recorded in the manner prescribed in this chapter, from the time of filing the same with the recorder for record, shall impart notice to all persons of the contents thereof, and subsequent purchasers and mortgagees shall be deemed to purchase and take with notice.

"Section 260. Every conveyance of real estate within this territory hereafter made, which shall not be recorded as provided for in this chapter, shall be deemed void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, or any portion thereof, where his own conveyance shall be first duly recorded."

The word "conveyance" is declared to include an instrument in writing by which real estate, or an interest therein, is mortgaged. A mortgage is therefore a conveyance, within the recording acts. But a mortgage does not create an estate in real property. It is a mere security for the payment of a debt or the fulfillment of an obligation, and is only a chattel

interest. (*Gallatin Co.* v. *Beattie*, 3 Mont. 173; *Holland* v. *Commissioners*, 15 Mont. 460, 39 Pac. 575.) While it affects lands by imposing a lien or charge upon them, it in no wise conveys title thereto. It is a mere incident to that which it secures. Is an assignment of a mortgage an instrument by which real estate, or an interest therein, is "created, alienated, mortgaged or assigned?" The mortgage itself does not create, alienate or assign any real estate or interest in real estate, nor does the assignment of the mortgage have such effect. (*Adler* v. *Newell* (Cal.) 41 Pac. 799; *Mott* v. *Clark*, 9 Pa. St. 399; same case, 49 Amer. Dec. 566.) Neither will it be claimed that the assignment is a mortgage or creates a lien. Its sole office is to transfer from one person to another title to a mortgage lien already on the land, and its operation is of necessity limited to that purpose. Again, under the modern doctrine touching the character of such security, a formal assignment of the mortgage is never required unless by force of statutory law. Usually the only act done is the sale of the debt or obligation, or the indorsement of the note the payment of which is secured by the mortgage, and this effectually carries with it the incident mortgage, which owes its birth to, and depends for continued life upon, the principal—the debt or obligation. So, when appellant purchased the notes, the mortgages passed with the notes as incident thereto. "The note to secure the payment of which the mortgage was given was negotiable paper, subject to transfer before maturity. The mortgage followed the note. It therefore made no difference whether or not the assignment of the note by Bolles & Co. [mortgagees] to Mrs. Dodge [indorsee of note] was on record." (*Dodge* v. *Birkenfeld*, 20 Mont. 115, 49 Pac. 590.)

We are cited to the decisions of the New York and Wisconsin courts, holding that assignments of mortgages are conveyances, within the terms of the statutes of those states. But the recording act of New York expressly provides that the word "conveyance" shall embrace an assignment of a mortgage, and that the word "purchaser" shall embrace an assignee of a mortgage, while in Wisconsin the word "purchaser"

includes the assignee of a mortgage. In many other states the statutes make provision for recording the assignment of a mortgage, but, in our opinion, the sections above quoted fail to do so. As supporting this conclusion, we cite *Bamberger* v. *Geiser* (Or.) 33 Pac. 609; *Craft* v. *Webster*, 4 Rawle 241; *Mott* v. *Clark*, *supra; Adler* v. *Newell*, *supra; Watson* v. *Dundee M. & T. Investment Co.* (Or.) 8 Pac. 548; *Oregon Trust Co.* v. *Shaw*, Fed. Cas. Nos. 10,556, 10,557; *Gordon* v. *Rixey*, 76 Va. 694.

3. Granting, however, the contention of the respondent to the effect that an assignment of a mortgage is a "conveyance," and the assignee a "purchaser," within the meaning of those terms as employed in the registry acts quoted, we think the proper interpretation of Section 260, *supra*, avails to confer upon appellant the prior right. Although appellant's assignor, Wallace, at the time he took and caused to be recorded the Diehl mortgages, had actual knowledge of respondent's prior unrecorded mortgage, yet he was not, and for an obvious reason could not be, charged with constructive notice thereof. Appellant purchased these mortgages, then of record, for value, and also in good faith; that is, without notice, actual or constructive, of the prior mortgage concerning which the record continued to remain silent. Proceeding, then, upon the assumption that the assignment of a mortgage is a "conveyance," and the assignee a "purchaser," within the recording statutes, we are nevertheless of the opinion that appellant, under these circumstances, succeeded to all the rights of Wallace as a mortgagee without constructive notice, and, in addition to such rights, became clothed with immunity as a purchaser in good faith and for a valuable consideration of the Diehl mortgages, whose own conveyances, to-wit, the mortgages, were first duly recorded. He acquired all the interest held by Wallace, and may claim whatever security is afforded by his grantor's recorded muniments of title, superadded to the protection gained by his own purchase for value and without actual notice. The mortgages from Diehl to Wallace were perfectly good between them, and were valid in the hands of

Wallace, but not enforceable by him to the prejudice of the prior mortgage to respondent of which he had actual notice. Wallace placed these mortgages on record and then indorsed the notes, the payment of which the mortgages secured, to appellant. When appellant purchased the notes so indorsed, he had no actual notice of the first mortgage, and the record certified the mortgages assigned to him by indorsement of the notes to be the first liens upon the lots. The omission of respondent to record its mortgage created an assurance, as if by statute, that it did not exist, and the priority to which respondent's mortgage would have been otherwise entitled is lost. The conveyances under which appellant claims are the mortgages. They are his own conveyances, within the meaning of the recording acts, and they were first duly recorded.

In his dissenting opinion in *Westbrook* v. *Gleason*, 79 N. Y., at pages 37 to 44, Judge Danforth had occasion to express views which, in so far as applicable to this case, we believe are correct. It is to be remembered that the recording act of New York declares the assignee of a mortgage to be a "purchaser" of real estate, and a "conveyance" to include an assignment of the mortgage. He said in part: "It is in accordance with equity that, as between himself and the defendant, the plaintiff should suffer the consequences of his own negligence in omitting to record his mortgage, and that he should not now be permitted, to the defendant's prejudice, to assert a priority for his mortgage which, by the express provision of law, is, because unrecorded, void as against one standing in the position of the defendant. (Citing the section of the New York statutes similar to Section 260, *supra.*) It is true that the assignment to the defendant was not recorded until after the plaintiff had placed his mortgage on record, but that is immaterial. The registry of the Jones mortgage serves the defendant." The mortgagee in that case, as in the case at bar, was affected with actual notice of a prior unrecorded mortgage.

Judge Danforth continues: "This was the doctrine in *Hooker* v. *Pierce*, 2 Hill, 650, where, speaking of certain con-

flicting claims to land arising on different conveyances, the court say: 'The registry of the grantor's deed inures, in the nature of things, to the benefit of all those who claim under him. They become entitled to use all his habiliments of title as their own. They might acquire a better title than he, but cannot be considered as having taken less. He being without constructive notice, they are not affected. It is enough that they personally act in good faith, as the jury found them to have done. This finding frees them from all imputation of notice.' The rule, and the reason of it, apply here. * * * Gleason, by the assignment of the Jones mortgage, became a purchaser *sub modo.* He acquired the interest in the real estate which the mortgagee took by the mortgage, and he is to that extent a purchaser, not only of the mortgage, but of the interest which is conveyed by it, and, as he became such in good faith and for a valuable consideration, he takes his title under that mortgage unaffected by the mortgage then unrecorded, which the plaintiff now seeks to enforce. I am thus led to the conclusion that the defendant is protected by the recording act from the consequences of notice to the mortgagee, and no other defect in his title is suggested.''

Appellant purchased negotiable paper before its maturity, in good faith and for value. Its payment was secured by mortgages then of record, which he acquired with the indorsement of the paper to him. Respondent's prior mortgage was not of record, nor did appellant have any notice of its existence. The equities, as well as the law, are with appellant.

The judgment and order appealed from are reversed, and the cause is remanded for a new trial, in accordance with the views expressed in this opinion.

Reversed and Remanded.

PEMBERTON, C. J., concurs.

HUNT, J. I concur in the decision and the opinion upon the first two grounds, but express no opinion upon the third proposition discussed by JUSTICE PIGOTT.

THE CITY OF GREAT FALLS, APPELLANT, v. WILL HANKS ET AL., RESPONDENTS.

[Submitted April 1, 1898. Decided April 18, 1898.]

Official Bond—Evidence.

1. OFFICIAL BONDS.—In an action against the sureties upon the bond of a treasurer, in which the answer admits that the treasurer during his term of office received all the moneys alleged in the complaint to have been received by him, it is not error to exclude testimony offered by the plaintiff for the purpose of showing the amount received by the treasurer from his predecessor.
2. SAME—*Death of Treasurer.*—The official bond of a city treasurer was conditioned for the faithful performance of his duties, and that when he should vacate the office, he would deliver to his successor all money and property belonging to the city held by him. *Held*, that his death during his term of office created a vacancy, but did not change his obligation; and that when the moneys were not paid over to his successor, the sureties on his bond were liable.
3. SAME—*Nature of Action.*—An action against the sureties upon an official bond of a treasurer, for a breach of the condition of the bond to the effect that the principal would turn over to his successor all moneys belonging to the city and received by him as treasurer, is an action upon a contract for the breach thereof.

SAME.—The complaint in such an action sufficiently alleges the breach of the condition of the bond, when it states that during his term of office he received a specified sum of money belonging to the city and failed to pay any of the same over; and the further allegation to the effect that the treasurer converted the same to his own use does not change the nature of the action or prejudice the defendant.

Appeal from District Court, Cascade County, C. H. Benton, Judge.

ACTION by the city of Great Falls against Will Hanks, Thomas E. Brady, K. B. McIver, A. E. Dickerman, R. Vaughn and J. H. McKnight. Judgment for defendants, and plaintiff appeals. Reversed.

Statement of the case by the justice delivering the opinion.

Action by the plaintiff and appellant, the City of Great Falls, against the sureties on the official bond of the treasurer of the city.

It appears by the complaint that one P. J. Elliott was the treasurer of the city of Great Falls from April 22, 1893, until August 5, 1893, when he died, during his incumbency of the office. It is alleged that he gave a bond with the defendants

and two others, since deceased, as sureties, conditioned for the faithful performance of the duties required to be performed by him as treasurer of the city.

The bond itself was in the penal sum of $75,000, and contained the following condition: "The condition of the above obligation is such that whereas, the said Parmlee J. Elliott was elected to the office of city treasurer, within and for the said city of Great Falls, on the 10th day of April, A. D. 1893: Now, therefore, if the said Parmlee J. Elliott shall well and faithfully perform all the duties of his said office of city treasurer, and shall pay over all moneys that shall come into his hands as such city treasurer, and shall deliver to his successor in office all moneys, books, properties, etc., belonging to his said office, then the above obligation shall be null and void; otherwise to remain in full force."

It is further alleged that between the 1st day of May, 1893, and the 5th day of August, 1893, Elliott, as treasurer, received various sums of money belonging to the city of Great Falls, amounting to about the sum of $18,000. After averring that it was the duty of the city treasurer to safely keep, and turn and pay over, the said moneys to his successor in office, the complaint continues: "But which said sum of money so as aforesaid belonging to plaintiff the said city treasurer then and there fraudulently and wrongfully, and in breach of his said trust and of the conditions of his said bond and obligation, converted and appropriated to his own use. And in further breach of his said trust, and of the obligation of his said bond, the said city treasurer, Elliott, fraudulently and wrongfully failed and neglected to pay over said sum of eighteen thousand dollars, or any part thereof, so as aforesaid coming into his hands as such city treasurer, and fraudulently and wrongfully converted and appropriated the same and the whole thereof to his own use, and thereby the said Elliott did fail to perform the duties of his said office." It is then alleged that, upon the failure of said city treasurer to faithfully perform the duties of his office as aforesaid, the defendants, by virtue of the provisions of the bond and of the premises

and of the law, became and still are obligated to pay the city the aforesaid sum of money "so as aforesaid fraudulently and wrongfully converted and appropriated to his own use by said city treasurer, Elliott, which said moneys are now due and payable to plaintiff from defendants, and became due and payable on, to-wit, August 5, 1893, no part of which has ever been paid."

It is alleged that on August 11, 1893, L. G. Phelps became the successor of the said Elliott as city treasurer, and assumed the duties of said office on said date. It is then averred that "no part of said sum of eighteen thousand dollars, so as aforesaid wrongfully and fraudulently converted and appropriated to his own use by said Elliott as city treasurer, of the moneys and property of the said city of Great Falls, has ever been repaid to plaintiff, or to the successor in office of said city treasurer by said Elliott, or by any one else, although payment thereof has been duly and frequently demanded." Judgment was asked against the defendants for $18,000 and interest.

The defendants, Vaughn, Dickerman, McKnight and McIver, answered jointly. They admitted the receipt of the $18,000 by Elliot as treasurer, but denied that Elliott ever wrongfully, fraudulently or at all converted the said sum, or any part thereof, to his own use, or that he failed to perform the duties of his office in any particular whatever. They also alleged that at the time of Elliott's death there was no one authorized to receive any moneys belonging to the city of Great Falls from him, and that his term of office did not terminate before his death, and that there was no successor appointed to take his place until subsequent to his death. Defendants denied that by any act of the said Elliott, or by any omission on his part, they or any of them, by the provisions of the bond, or by the laws of the state, ever became or are jointly and severally liable to plaintiff in any sum whatsoever, and denied that the sum mentioned in the complaint became due or payable from the defendants on August 5th or any other time, but alleged affirmatively that the whole sum of

$18,000 has been fully paid to the plaintiff. They further denied any wrongful conversion by Elliott, and then set up certain matters in relation to the signatures upon the bond having been made upon the condition that the bond should not be operative, or take effect, or be delivered to the plaintiff, until fourteen other competent sureties had been obtained thereto and had executed the same. It is also alleged that the plaintiff city never made demand of any kind upon the legal representative of said Elliott, deceased, for any of the moneys claimed in the complaint. And as a further defense it was alleged that at the time of Elliott's death he had on deposit in national banks at Great Falls the $18,000 described in the complaint, which was on deposit to the credit of the city treasurer of Great Falls, and not to his individual credit, and that subsequently, in September, 1893, the plaintiff made proof of its ownership of said moneys, and claimed the same as its deposit, and received credit at the hands of the receivers of said banks for all the moneys so held on deposit, and has since said time received payment of the same, and thereby has released the said Elliott's estate, as well as these defendants, from any claim that it might possibly assert as a liability upon the bond described in the complaint.

The plaintiff's replication denied all the new matter contained in the answer in relation to the condition imposed at the time of the execution and delivery of Elliott's bond; denied that at the time of his death Elliott, as treasurer, had any moneys on deposit to his credit as treasurer, as alleged by defendants; and denied that plaintiff claimed moneys on deposit, and received the same, and thereby or otherwise released Elliott's estate or the defendants from liability; and denied that it ever had received any part of the $18,000 mentioned in its complaint.

The cause was tried in April, 1896, and judgment rendered for the defendants. The court made special findings to the effect that prior to Elliott's death he deposited in his name as city treasurer, in the Merchants' National Bank of Great Falls, a portion of the funds coming into his hands as city treasurer,

and that on July 24, 1893, the said bank suspended payment and went into the hands of a receiver.

The sixth and ninth findings of the court were as follows: "No. 6. The court further finds that the said Merchants' National Bank was a bank incorporated under the laws of the United States, which had been doing business in the city of Great Falls for a period of several years prior to the making of the deposit by the city treasurer as aforesaid; and there is no evidence in the case showing, or tending to show, that the bank at the time of the making of said deposit, or at any time prior to the appointment of a receiver as appointed, was not solvent or in good repute." "No. 9. The court further finds that the said P. J. Elliott did not convert, either fraudulently or otherwise, any of the moneys received by him as city treasurer, to his own use, and that he did at all times faithfully perform the duties of his office."

As conclusions of law, the court found that Elliott's action in respect to the moneys deposited in the Merchants' National Bank was lawful, and not a conversion of any of the funds received by him as city treasurer.

The plaintiff moved for a new trial. This was denied, and plaintiff appeals from the order denying the same and from the judgment.

H. H. Ewing, *Sam Stephenson*, *Ransom Cooper and Leslie & Downing*, for Appellants.

A. J. Shores, *T. E. Brady and Geo. W. Taylor*, for Respondents.

Hunt, J. Several assignments of error are predicated upon rulings made upon the trial of the case, whereby the court excluded certain evidence offered by plaintiff to show that Elliott's predecessor in office turned over to him certain sums of money, the property of the city of Great Falls. We find no error in this action of the court, inasmuch as it was expressly admitted by the answer that Elliott, as treasurer, did

between May 1 and August 5, 1893, receive $18,000 in money belonging to the said city. Plaintiff having asked judgment for $18,000 and interest only, the evidence was immaterial.

Plaintiff then introduced evidence of the failure on July 24, 1893, of the Merchants' National Bank at Great Falls, the depository where Elliott, as treasurer, had to his credit when he died the sum of $21,184.78. This evidence was properly admitted.

Thereafter plaintiff asked L. G. Phelps, the successor in office of Elliott and receiver of the suspended Merchants' National Bank, whether the money found to have been deposited in said bank by Elliott had been deposited there before the suspension of the said bank. Defendants objected to this question as immaterial, unless plaintiff intended to show "an unlawful deposit." The court properly overruled this objection.

Plaintiff also proved a demand of defendants, and the fact that three dividends, of 10 per cent. each, had been paid to the city treasurer by the receiver of the Merchants' National Bank since the suspension, but that no money had been paid by defendants to the city's account.

Upon substantially the foregoing concessions and proofs each party moved for judgment. Defendants prevailed.

In a memorandum opinion by the district judge, wherein he gave his reasons for deciding in respondents' favor, he said in part: "The only breach in the conditions of the bond, if one was committed, was in the failure on the part of Elliott to pay over the moneys coming into his hands. The recovery is not sought upon any other grounds. This became impossible because of the sudden death of Elliott by drowning in the Missouri river. It cannot be that the legislative intent was that a principal on a bond, the condition of which requires him at the expiration of his term to turn over to his successor the funds in his hands, should be considered in default of that condition because of his death.

"The statutory obligation is that the treasurer, when he vacates his office at the expiration of his term, or before, shall

deliver to his successor in office all moneys, etc., belonging to the city, held by him as treasurer, and there could be no liability under the statute if death prevented it. There was no wrongful conversion before his death; there could not be after."

We disagree with this view of the law. The statute under which Elliott gave bond as city treasurer was as follows: "The treasurer shall give bond to the city in its corporate name, with sureties to be approved by the council or board of aldermen, in such sum as may be required, which shall not be less than the total amount of moneys estimated to be paid to him during the year, for the fathful performance of his duties as treasurer, and also when he vacates the office that he will deliver over to his successor all money, books, papers, property and all other things belonging to the city or town, held by him as treasurer." (Compiled Statutes 1887, div. 5, § 350.)

There is in the statute no provision, expressed or implied, limiting the liability of the treasurer to a vacation of office at or by the expiration of his term, but a plain obligation upon him that, when he does vacate, he will deliver over to his successor all money, etc., belonging to the city held by him as treasurer. An existing office is vacated by the death of the incumbent as well as by his resignation or removal. The fact that death overtakes an officer cannot alter the consequential fact that the office is thus vacated, or lessen the liability of the official or his sureties. The condition of Elliott's bond was for the faithful performance of his duty as treasurer, and that he would pay over all moneys that came into his hands as treasurer, and deliver to his successor all moneys belonging to the office of treasurer. It was part of his duty under the statutes to deposit all money of the city in his name as treasurer. By so holding it in his official name, if at any time or for any reason, accidental or otherwise, he might vacate the office, his successor could at once be possessed of the funds belonging to the city. Death did not change the legal obligation on Elliott to be honest, or to faithfully perform the duty of having all the moneys belonging to the city on hand and in

his name as treasurer, so that his successor could receive them at once, if a vacancy should occur; it only prevented the manual tradition by Elliott to any successor in office of the deposits themselves, or of evidences of such deposits. And, when his sureties agreed that he would faithfully perform his duties, they also agreed that when he vacated the office he would have on hand for delivery over to his successor all moneys received by him as treasurer. So, when the vacancy occurred and the city's moneys received and deposited by the treasurer were not on hand, and were not paid over, there was a breach in the conditions of the bond, Elliott's duty had not been faithfully performed, and the sureties became liable to make good any deficiency, and to pay the same over to Elliott's successor in office. To countenance any other rule would be to impair the security of public funds. It cannot be that the sureties of an official who has absconded with public moneys, or of one who has embezzled them, yet who has died before his term expired, are in a far better position than the bondsmen of one who, though equally guilty, has remained in office until the expiration of his term. If such be the law, flight or suicide of officers who are short in their accounts before their terms may expire are tempting hopes of their sureties. Such never was the intention of the legislature, and such is not the language of the statute.

The case of *Allen* v. *State*, 6 Blackf. (Ind.) 252, is in point, although not nearly so strong a case as the one at bar. There the official gave bond to pay over to his successor, at the expiration of his term of service, all moneys which might then be in his hands. The official died during his term, with various sums of money in his hands as an official. When the sureties were sued because no money had been turned over, it was argued that it was impossible for a commissioner, whose successor was not appointed until after his death, to deliver money to such successor. But Judge Dewey, for the court, held such objections were not well taken. Speaking of the purpose of the legislature, he said: "Their intention doubtless was that that the bond should secure the payment over to the

proper officer of all the school funds remaining in a commissioner's hands at the termination of his service, however that event might be produced, whether by resignation, removal or death." We approve of this view, as applied to the bond given by Elliott, considering the statutes of this state then controlling. Murfree on Official Bonds, § 455, disapproves of *Allen* v. *State*, *supra*, but places the reason for his disapproval upon the particular terms of the bond, which imposed no condition upon the officer to pay over until the expiration of his term of service. Inasmuch as the statute of Montana, heretofore quoted, required a bond by the treasurer with sureties to pay over when he vacated, the criticism of Murfree loses all force in the present case. Throop on Public Officers, § 251, also lays it down that, as against a treasurer's sureties, the condition of the treasurer's bond is broken if he dies with funds in his hands unaccounted for, citing the Indiana decision to uphold the test. The laws requiring the city treasurer to deposit all moneys received by him as treasurer to his official account, and governing his official acts in relation to city funds, make him a bailee. (*City of Livingston* v. *Woods*, 20 Mont. 92, 49 Pac. 437.) When the treasurer died, and his office was vacated, the bailment terminated, and the city, through Elliott's successor, had a right at once to claim its money. (Lawson on Bailments, 62; Hale on Bailments, page 76.)

The expression of the foregoing views upon the liability of the treasurer and his sureties leads us to conclude that the complaint in this action is sufficient. It is good in its averment of a failure to safely keep the city moneys, and to deliver them over to his successor, and in its allegations of a failure and neglect on Elliott's part to pay over the sum of $18,000, or any part thereof, that came into his hands as treasurer of the city of Great Falls. If these allegations were true, he failed to perform the duties of his said office.

The complaint is drawn in contract, notwithstanding its allegations of a fraudulent and wrongful conversion. The pleader in making the charges of conversion believed the omission of a city treasurer to safely keep city funds war-

ranted such legal conclusions. The complaint, however, having been framed on the theory of an action to hold the defendants upon their liability in contract, immaterial, or even incorrect, legal conclusions do the defendants no possible harm. (*Greentree* v. *Rosenstock*, 61 N. Y. 583.)

We gather from the pleadings and proceedings that plaintiff had two theories of the case—one, that a failure to safely keep and pay over the city money constituted breaches of the bond; another, that a deposit of city funds in a bank that afterwards suspended by a city treasurer necessarily constituted a conversion. The first theory is correct, but the latter is not. (*Livingston* v. *Woods*, *supra*.)

Defendants likewise proceeded upon an erroneous theory in regarding the only issue in the case to be whether Elliott, as treasurer, fraudulently and wrongfully converted and appropriated to his own use $18,000 of the city's money received by him as treasurer. They should have recognized the action as one in contract. Now, however, that the law concerning the liability of a city treasurer has been settled by the doctrine of *Livingston* v. *Woods*, *supra*, the parties hereto can amend their pleadings and try this case in accordance with the simple rules laid down in the opinion filed therein.

Believing it just and proper that the action should be tried anew, the judgment and order of the district court are reversed, and the cause is remanded, with directions to grant a new trial.

Reversed and remanded.

PEMBERTON, C. J., concurs. PIGOTT, J., disqualified.

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STATE OF MONTANA EX REL., JOHN T. WILLIAMS ET AL., RESPONDENTS, *v.* JOHN W. MAYHEW ET AL., APPELLANTS.

[Submitted March 28, 1898. Decided April 18, 1898.]

New Counties—Appointment of Officers.

NEW COUNTIES—*Appointment of Officers.*—The Legislative Assembly, having the power to create new counties, may, as an incident to the creation, appoint provisionally, in the act creating a new county, the officers, including commissioners.

2. **SAME.—Constitution, Article 16, § 4, provides that there shall be elected in each county, county commissioners to serve for a term of four years. Act of Feb. 16, 1893, created Ravalli county, and named three persons as county commissioners to serve until the next general election in 1894. *Held,* that the officers then elected were entitled to serve for the full constitutional term, which begins at the first general election succeeding the creation of the county, and is not computed quadrenially from the adoption of the constitution in 1889.**
3. **SAME.—Where the act creating a new county also named persons to act, who did qualify and act as its officers until their successors were elected, no vacancy in such offices existed on the passage of the act creating them.**

Appeal from District Court, Ravalli County, F. H. Woody, Judge.

QUO WARRANTO by the state, on the relation of John T. Williams and others, against John W. Mayhew and others. From judgment for relators, defendants appeal. Reversed.

Statement of the case by the justice delivering the opinion.

This is a quo warranto proceeding. Both parties to the controversy claim to be the rightful commissioners of the county of Ravalli, and this proceeding was instituted to determine as to which of the parties were entitled under the law to exercise the duties of the office of commissioners in that county.

From the history of the case as disclosed by the record it appears that Ravalli county was created by an act of the legislative assembly approved February 16, 1893, which act took effect on the 1st day of April thereafter. The act filled all the offices of the county by naming persons for each office,

including that of county commissioner. The county, as organized, was attached to the Fourth judicial district for judicial purposes. J. M. Johnson, B. S. Chaffin and Abe Mittower were named in the act creating the county as its first commissioners authorized by the act to serve, and did serve until January 7, 1895. At the general election held in said county on the 8th day of November, 1894, the defendants in this proceeding were elected county commissioners to succeed those named in the act creating the county. The defendants qualified as such commissioners on the 7th day of January, 1895, and were holding such offices when this action was commenced. Refusing to admit plaintiffs into office, the defendants claiming that their terms did not expire until November 8, 1898, this suit was commenced, to determine the controversy as to who are the legal commissioners of Ravalli county.

On the trial the defendants filed a general demurrer to the complaint, which was overruled, and, the defendants declining to further plead, judgment was rendered by the court that the plaintiffs were the duly and regularly elected commissioners of said county. From this judgment defendants appeal.

Robt. O'Hara and C. B. Nolan, for Appellants.

A. J. Craven and C. D. Calkins, for Respondents.

PEMBERTON, C. J. The material question involved in this appeal, and the one that has given us the most serious trouble and concern, is as to the power of the legislative assembly to fill the offices provisionally in a county created by that body, by naming the respective officers in the act itself. The district court did not pass upon this question, saying it was unnecessary, in its view of other legal questions involved. But the question is presented in both briefs, and we think it the pivotal one presented for determination.

The district court held, substantially, that all commissioners are required by the constitution to be elected every four years, commencing the year of the admission of the state into the Union; and that this rule applies to new counties as well as

those in existence at the time of the adoption of the constitution. According to this rule, whenever it is proposed to elect commissioners, it is necessary to go back to the date of the admission of the state, and count four years forward, and then four years more, and so on, to determine whether the time has arrived for such election. It is further held by the district court that this rule of computation applies also to appointments to fill vacancies in the office of county commissioner. Proceeding upon this rule and theory, the district court held that, whether the legislative assembly had the power or not to appoint or elect the county commissioners of the county by the act creating it, such commissioners were only so elected or appointed to fill an unexpired "commissioner's term," and that when the original commissioners had served the time prescribed by the act creating the county, and went out of office, they still left a part of the same unexpired constitutional term to be filled by the defendants, holding, of course, that the election of commissioners in the year 1894 was void, because by this theory it is insisted no election for commissioners could legally occur until the general election in November, 1896, when plaintiffs were elected. This theory assumes, of course, that when the legislative assembly created Ravalli county, and filled the several county offices by the act which took effect April 1, 1893, all the offices were, in law, vacant. The district court reasons that the term of the commissioners of Ravalli county, notwithstanding the county was created in 1893, commenced, by the terms of the constitution, in 1892; hence the first and second sets of commissioners were, while serving, filling parts of an unexpired term.

In support of this view the district court says: "Therefore the court holds that the term for which county commissioners were elected was four years, neither more nor less; that the first term commenced on the 8th day of November, 1889, the day on which the state was admitted into the Union, and ended on the 8th day of November, 1893, and that the second term commenced on the 8th day of November, 1893, and ended on the 8th day of November, 1897; that these terms were general

and uniform throughout all the counties of the state; that this term of office applied as well to new counties as to the old ones; that in a new county, created after a current term had commenced to run, the persons appointed to fill the office of county commissioners would hold their offices for the remainder of the unexpired current term. Ravalli county was created and came into existence on the 1st day of April, 1893. If the county had been created without the act creating it naming the persons to fill the office of county commissioners, there certainly would have been a vacancy which the district judge of the district in which the county was situated could have filled by appointment, and such appointees would have held for the remainder of the then current term, to-wit, to November 8, 1893; and, as a new current term would have commenced on November 8, 1893, and as no election could have been held until November, 1896, there would have been a vacancy, and it would have been the duty of the district judge to have filled the vacancies for such term. If the legislature had the power to appoint (a question that this court does not undertake to decide), certainly its appointees would stand on the same footing as the appointees of the district judge, and would hold for the same term."

The district court bases its views upon Section 4, Art. 16, Section 5, Art. 16, and subdivision 9, ord. 2, of the constitution of the state. We raise no question that, as a general proposition relating to counties in existence, the legislative assembly has no power to elect or appoint county officers by an act or otherwise. To so hold would be to ignore and do violence to the theory of local self-government, which is conceded to be the fundamental principle—the corner stone—supporting our whole system of government. But we are not dealing with general principles or ordinary conditions. We are now concerned with exceptional rules and conditions. All rules and laws have their exceptions. These exceptions spring from the extraordinary facts and conditions that surround the subjects and actors involved.

Let us, then, return to the main question involved here.

Did the legislative assembly have the power to appoint or name provisionally the county officers of the county, including county commissioners, in and by the act creating Ravalli county? It is and must be conceded that the legislative assembly has the power to create new counties. "The creation of counties is an act of the sovereign power of the state, and is not based on the particular solicitation, consent or concurrent action of the people who inhabit them. As a general rule, the power of the legislature in the division of the state into counties is absolute, and it may alter, modify or destroy them, as the public good may require." (Am. and Eng. Enc. Law, Vol. 4 (1st Ed.) 345, and authorities cited in notes.)

But what is meant by creating a county by the legislative assembly? It means more than forming and defining it geographically.

In *People* v. *McGuire*, 32 Cal. 141, the court says: "To constitute a county, something more is required than to define its boundaries. A local government must be provided, and the creation of the county is not accomplished until both these things have been done in the appointed mode."

This amplification of what is meant by creating new counties is most reasonable and just. It certainly seems that something more than laying out the boundaries and naming the offices is necessary to be done before it can be truthfully said that a county has been created. Such a creature would be a lifeless and useless thing until inspired with motion and power and means to act in fulfilling the purpose of its creation. When it is said that a county has been created, it is, and ought certainly to be, understood that a municipality has been organized with power and means to aid the state in administering its political affairs, and in promoting the welfare of the people and best interests of the commonwealth. A county cannot be said to be created by the sovereign power until it is endowed with the power and means to aid in these important matters of the state.

In *People* v. *Hurlbut*, 24 Mich. 44, 9 Amer. Rep. 103, the important question here involved was ably and

elaborately discussed by that great constitutional lawyer, Judge Cooley. The legislature of Michigan had passed a law "to establish a board of public works in and for the city of Detroit." The members or officers of the board were appointed by the legislature in the act itself, just as was done in the case at bar, except that the Michigan law appointed permanent officers, while the act creating Ravalli county appointed the officers only until the next election, or provisionally. That eminent jurist, Judge Cooley, discusses in this case the whole doctrine of local self-government, and the right of the people of Detroit, under the constitution of the state, to elect their local officers, or have them appointed, in case of vacancies, by another power than the legislature, and arrives at the conclusion that the action of the legislature, in so far as it attempted to appoint permanent officers for the city of Detroit was void, but held that such appointments were only void in so far as they were permanent, and were good as provisional appointments.

As determining this important question, we quote at length the forcible language of this great judge. He says: "So far, then, as the act in question undertakes to fill the new offices with permanent appointees, it cannot be sustained; either on general principles or on the words of the constitution. It may, nevertheless, not be wholly void. I have no doubt it was entirely competent for the legislature to abolish the old boards and provide for a new one to take the place of all. That would be but the ordinary exercise of legislative supervision and control in matters of municipal regulation. I think, also, that the legislature might make provisional appointments to put the new system in operation. The right to do this appears to me to be incident to the right to confer and recall corporate power, and rests upon the same ground as the right to provide for the organization of the municipal corporation in the first place, for the apportionment of its property and debts if its territory should be divided and organized into two, or for the winding up of its concerns if the charter should be taken away. There is no doubt of the right of the state to do any of these

things, nor by virtue of any general authority to take to itself the management of the local concerns, but because the inauguration and modification of local government can only be provided for without confusion and injustice, by the aid of the guiding and assisting hand of the authority that creates and modifies. The right in the state is a right not to run and operate the machinery of local government, but to provide for and put it in motion. It corresponds to the authority which constitutional conventions sometimes find it needful to exercise when they prescribe the agencies by means of which the new constitution they adopt is to be made to displace the old. * * * But these appointments may, nevertheless, be good provisionally. A legislative act is not void for excess of authority at one point, unless the excess is in a particular which precludes giving effect to the rest according to the obvious intent. In this case the excess can hardly be held vital, for we must suppose the object of the legislature, in making the first appointments, was not to appropriate patronage to itself, but only to secure the organization of the new system without confusion; otherwise they would have retained the choice of commissioners permanently. The appointment of these men, then, the conferring upon them of the enumerated powers, and the displacement of old officers, were all entirely within legislative authority. The excess of authority was only in providing that the appointments made should continue for two, four, six and eight years. Now, suppose the legislature had expressly made the appointments provisional, and had then provided that two, four, six and eight years hence new appointments should be made, and that in the meantime the common council might fill any vacancies that might occur, would the whole act be void because it failed to fix a time when the powers of the provisional appointees should cease? I think not. The act was not passed to give four men an office; their appointment was merely incidental to the main purpose."

In Michigan the constitution provided for the election or appointment of such officers otherwise than by the legislature.

But the supreme court held that such constitutional provision did not prevent the legislature from appointing such officers provisionally. The same principle is involved here. While our constitution provides that county commissioners shall be elected or appointed otherwise than by the legislature, it does not mean that the legislature may not appoint them provisionally, when new counties are created, as an incident to their creation, and for the purpose of putting them in motion.

Meecham, in his work on Public Offices and Officers (Section 123), holds that for the purpose of primary organization the legislature may appoint the local officers provisionally. It has frequently been held by the courts that in creating new counties or towns, or political municipalities or boards, the legislature might elect or appoint, or provide for the election or appointment of, the officers necessary to put such governmental agencies or political municipalities in motion and operation in a manner different from that provided by the constitution for the election or appointment of such officers generally. (See, also, *Attorney General* v. *Weimer*, 59 Mich. 580, 26 N. W. 773; *State* v. *Swift*, 11 Nev. 128; *State ex rel. Clarke* v. *Irwin*, 5 Nev. 111; *Sabin* v. *Curtis* (Idaho) 32 Pac. 1131; *People* v. *Freeman*, 80 Cal. 233, 22 Pac. 173; *State* v. *Seymour*, 35 N. J. Law, 47.) These authorities proceed upon the theory that the creation of these new municipalities is more or less a matter of emergency, in which case the legislature has unlimited power to decide the propriety of action, as well as the sole power to create, and in the exercise of such power in creating such political municipalities—the creation of which is the principal object of legislation—may appoint, or provide for the election or appointment of, provisional officers, in a manner different from that provided by the constitution for the election or appointment of such officers generally, as an incident to the power to create. We are satisfied that this view of the question is sound in law and reason, and that it will aid in the administration of the political affairs of the state if applied in all cases like the one under consideration.

We think, therefore, that the commissioners appointed by

the act creating Ravalli county were not *de facto* officers merely, but were such *de jure*.

The contention that the original commissioners of the county and their immediate successors, the defendants, were and are filling out an unexpired term or vacancy is, we think, untenable. We are unable to find any support for the theory that by the terms or spirit of the constitution commissioners should always be elected in all the counties, old and new, at the same time, and that time every four years from the date of the adoption of the constitution. We see no valid reason for such construction of the constitution in this respect. What good can come to the state, or any part of it, from having commissioners elected throughout the state at the same time? What harm can result if a new county shall elect its commissioners at a different time from that at which the old counties elect? Nor can we agree with counsel that there were vacancies in any of the county offices in the county at and immediately after the date when the act took effect creating Ravalli county. The same law that created the county and its several offices named or appointed the incumbent for each office. The moment the office was actually created, there stood the officer to qualify and take possession. It is not reported that there were any derelicts. If any officers named had refused or failed to qualify, then there would have been a vacancy.

We think, therefore, that the legislature had the power to fill provisionally the offices created by the act organizing Ravalli county, by naming the several officers in the act, including commissioners, and that the commissioners so named in the act held for the time prescribed in the act, and that at the end of that time, to wit, at the next general election thereafter, it was lawful and proper, under the constitution, to elect their successors, who would be entitled to hold their offices for four years, the term for which commissioners hold office under the constitution from the time of their qualification. To hold otherwise would be to hold the act creating Ravalli county unconstitutional and void in part. We may not rightly do so if we can consistently find support in the fundamental law of

the state for such legislative action. We think the conclusion we have reached well supported by authority and reason, and believe it will produce beneficial results to the state.

The judgment of the district court appealed from is reversed, and the cause remanded, with directions to enter judgment in favor of the defendants to the effect that they are entitled to the offices of county commissioners of Ravalli county.

Reversed and Remanded.

HUNT and PIGOTT, JJ., concur.

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MAGGIE WHITBECK, RESPONDENT, v. THE MONTANA CENTRAL RAILWAY CO. AND THE GREAT NORTHERN RAILWAY CO., PETITIONERS.

[Submitted April 6, 1898. Decided April 25, 1898.]

Judgment—Vacation—Power of Court.

Under Constitution, Article 8, Section 17, and Code of Civil Procedure, Section 38, abolishing terms of court in judicial districts composed of one county, and Sections 1720, 1722, 1723, providing a method for review of judgments by motion for a new trial and by appeal from order denying or granting the same, or from final judgment, and not otherwise, a court in such districts, having regularly made an appealable order, has no power to set it aside on its own motion; it not having been made inadvertently or improvidently.

ACTION by Maggie Whitbeck against the Montana Central Railway Company and the Great Northern Railway Company, in the District Court of Cascade County, J. B. Leslie, Judge. There was an order reversing a judgment for defendants, and defendants apply for a writ of certiorari. Granted.

A. J. Shores, for Petitioners.

"Has the District Court of Cascade County, 'Terms?'" Citing Section 7, Article VIII, of the State Constitution, Section 38 of the Code of Civil Procedure; *State* v. *McHatton*, 25 Pac. 1046, and other sections of the Code of Civil Procedure.

"The procedure for review of orders and judgments of the

district court is prescribed by statute, and the course prescribed by statute must be followed." (Citing Section 1720, Code of Civil Procedure; *Grant* v. *Schmidt*, 22 Min. 1; *Hanson* v. *Hanson*, 20 Pac. 736; *Carpenter* v. *Superior Court*, 19 Pac. 174; *Coombs* v. *Hibbard*, 43 Cal. 452; *Waggenheim* v. *Hook*, 35 Cal. 216; *Dorland* v. *Cunningham*, 6 Pac. 135; *Lang* v. *Superior Court*, 12 Pac. 306; *McKenzie* v. *Bismark Water Co.*, 71. N W. Rep. 608.)

"When the court made its order of the 25th, it thereby rendered final judgment in the action." (Citing Section 1000, Code of Civil Procedure.)

"Distinction between rendition of a judgment and its formal entry." (Citing Black on Judgments, Volume I., Section 106, as follows: "The rendition of a judgment is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy as ascertained by the pleadings and the verdict The entry of a judgment is a ministerial act. * * * * It is the former, therefore, that is the effective result of the litigation." Citing, also, *Tift* v. *Keaton*, 2 S. E. 690; *Gallarado* v. *Reed*, 49 Cal. 346; *Genella* v. *Relvea*, 32 Cal. 159; *In re Cook's Estate*, 19 Pac. 431; *Crim* v. *Kessing*, 26 Pac. 1074.)

J. A. Largent, for Respondent.

"It would seem that terms of court are necessary in order to carry out the intention of certain statutes." (Citing Section 131, Code of Civil Procedure; Section 4216, Political Code; Black's Law Dictionary, subject, "Term"; 19 Texas Appeals, 433; Section 39, Code of Civil Procedure; *State* v. *McHatton*, 25 Pac. 1046; Subdivision 8, Section 110, Code of Civil Procedure.)

HUNT, J. The petition discloses that Mrs. Whitbeck brought an action against the petitioners (defendants in the action mentioned) to recover damages for cruel and inhuman treatment alleged to have been inflicted by defendants. Defendants answered, denying the averments of the complaint,

and setting up a justification. Upon the issues thus framed by the pleadings the action was pending, when, on September 25, 1897, defendants therein (petitioners here) moved for judgment on the pleadings, on the ground that the complaint failed to state facts sufficient to constitute a cause of action against either of the defendants. This motion was granted, and plaintiff's motion to amend her complaint was denied.

Thereafter, on September 27th (that is, two days after judgment on the pleadings had been rendered), the court, of its own motion, without any application therein on the part of either party, and without defendants' consent that there should be any further action had in the matter, made and entered the following order:

"The defendants' motion for judgment upon the pleadings herein, sustained on Saturday, September 25, 1897, is this day hereby reversed, and it is hereby ordered that said motion be denied."

Petitioners allege that the judgment rendered on September 25th was not made or rendered or entered through any mistake or inadvertence on the part of the district court, and that the order of September 27th, reversing and setting aside the former order, was beyond the power and authority of the court. The office of the petition is to have this court review the record of proceedings of the lower court, and to determine whether the order of September 27th, reversing the first order of the district court, was within the jurisdiction of the court that made it.

Section 17, Article 8, of the Constitution, provides that the district court in each county which is a judicial district by itself shall be always open for the transaction of business, except on legal holidays and nonjudicial days. In *State* v. *McHatton*, 10 Mont. 370, 25 Pac. 1046, it was said by Chief Justice Blake, for the court, that a district court without terms is a legal impossibility, and that the constitution and statutes recognized and sanctioned that proposition. We shall not controvert that holding, further than to state that the court evidently was not advised of the fact that Section 5 of

Article 6 of the Constitution of California ordained that the superior courts of that state should be always open, legal holidays and nonjudicial days excepted, as is required by Section 17 of Article 8 of our Constitution, and that it had been decided in 1886, *in re Gannón*, 69 Cal. 541, 11 Pac. 240, that the system of terms and final adjournments of courts, under which the judges thereof had formerly opened courts for the transaction of judicial business, was abolished by constitutional provisions like those of Montana, and that there is no such thing as a division of time into certain periods of the year, known as "terms of court," during which a court may sit to hear and determine causes. "The superior court of each county in the state is an organized judicial institution, competent for the transaction of business at all times, without reference to terms or adjournments. So that, notwithstanding an order for adjournment entered on the minutes of the court, the court may sit and exercise its jurisdiction in the trial of causes, or in the transaction of any legal business, at any time. (*Stewart* v. *Mahoney Mining Co.*, 54 Cal. 149.) And it follows that neither an end of the session of the court, nor a final adjournment of the court for the year, would have the legal effect of dissolving the grand jury." *In re Gannon, supra.*

Several years after the decision in *State* v. *McHatton*, *supra*, the legislature of this state, following the doctrine of the California court, and interpreting our constitution as abolishing terms of court in certain districts, by adopting the Code of Civil Procedure enacted the following express statute:

"The district court of each county which is a judicial district by itself has no terms, but must be always open for the transaction of business, except on legal holidays and nonjudicial days, and must hold its sessions at the county seat. Juries for the trial of causes must be called on the first Monday of every alternate month, if the judge so direct, and oftener if public business requires. In each district where two or more counties are united, the judge thereof must fix the terms of court in each county in his district, which must

be held at the county seat, and there must be at least four terms a year in each county. The judge of such district court must, within ten days after the taking effect of this code, and thereafter, within ten days after the first day of January in each year, make an order which must designate the times at which the terms of court are to be held in each county in his district during the year, and must cause said order, or a copy thereof, to be filed in the office of the clerk of the district court in each county in his district, and such clerk must cause the same to be published in some newspaper printed in his county, once a week for four successive weeks, immediately after the filing of such order, the cost of which shall be a county charge, and no change in the time of holding the terms so fixed in any county must be made during the year. A district judge may adjourn a term of court in one county to a future day certain, and in the meantime hold court in another county." (Section 38, Code of Civil Procedure.)

So that, whatever the correct rule was before the codes were adopted, it is very plain to us that under the present statutes there is no term of court in any judicial district of the state where a single county is a district by itself. Such district courts are in recess when not actually engaged in business, and they are in session when in fact holding court at the county seat, and engaged in business. (*In re Gannon*, *supra.*)

This brings us directly to the point urged by petitioners, that the order of reversal of September 27th was unauthorized and void. The order of the court sustaining the defendants' motion for judgment on the pleadings was a judgment rendered in defendants' favor. (§ 1000, Code of Civil Procedure.) Now, by section 1720 of the Code of Civil Procedure, a judgment or order, except when expressly made final by the Code of Civil Procedure, may be reviewed as prescribed by the title of the codes concerning appeals (title 13), and not otherwise. The statute limits the power of the court to review a judgment, except as provided by the code. It is a statutory limitation of the court's jurisdiction. The practice under the common law, whereby a court of record, having general juris-

diction, might at any time during the same term correct any error in its judgment, although after the judgment has been entered, is not material to the decision of this case, inasmuch as the code provides a method for review by motion for new trial, to be made after notice, and within a certain time, and appeal from an order denying or granting the same, or by an appeal within a limited time from a final judgment entered in an action. (§§ 1722, 1723, Code of Civil Procedure.)

The English courts proceeded upon the theory that during the term the record was "in the breast of the judges," and not until the term was closed was the record made up and completed, after which it could not be disturbed. (Works on Jurisdiction, p. 674; *Territory* v. *Clayton*, 8 Mont. 14, 19 Pac. 293.) But where the constitution and the codes recognize no terms of court, and abolish them, it is unreasonable to attempt to apply the rules of the common law. They are inapplicable. (*Wiggin* v. *Superior Court*, 68 Cal. 398, 9 Pac. 646.) Where, therefore, there is a definite manner to obtain relief prescribed (as under the codes of this state), and where there are no terms of court (as is also the fact in the district wherein this case arose), proceedings to obtain relief must be instituted according to the methods, and within the time prescribed. (Works on Jurisdiction, p. 675.)

Analogous questions have frequently arisen in California; a leading case being *Coombs* v. *Hibberd*, 43 Cal. 452. The defendant there recovered judgment in the district court. The plaintiff moved for a new trial, which motion was denied. A few days after the denial of such motion, the plaintiff gave notice of a motion to vacate the order denying a new trial, and to grant an order allowing the motion for a new trial to be reheard. The district court thereafter heard this motion, and made an order granting a new trial. On an appeal by the defendant, it was held by the court that the right to move for a new trial is "a creature of the statute," and but one statement and one motion were provided for by law.

Among other things, the court said: "The motion to vacate the order was equivalent, in its effect upon the parties, to a renewed motion for a new trial. It demanded another

hearing of a question once determined, and resulted in the granting of a new trial which had been once refused. If this practice should be allowed, several consequences not contemplated by the statute would ensue. The limited time within which a motion for a new trial may be made would be practically enlarged, for there can be no good reason why the motion to set aside the order should be made within a limited number of days. The proceedings after judgment would be interminable, for the last order could be vacated upon motion of the losing party, and so *ad infinitum.* There must be some point where litigation in the lower court terminates, and the losing party is turned over to the appellate court for redress."

Hayne on New Trials and Appeal, Section 167, cites *Coombs* v. *Hibberd*, *supra*, and states the general rule under the California practice to be that, "where an appealable order has been regularly made, the court which made it has no power, upon a subsequent change of opinion, to set it aside, except in cases provided by statute." There is, of course, recognized throughout the books an exception to the general rule as stated by Hayne, to the effect that, if the order made by the lower court has been inadvertently or improvidently made, it may be vacated; and perhaps, if it has been prematurely entered, the court may vacate such an order of its own motion. These qualifications do not affect the case at bar, however; for it is conceded that the district court of Cascade county did not render judgment on the pleadings in favor of defendants either through inadvertence, or prematurely, or through improvidence. (Hayne on New Trials and Appeal, § 164; *Carpenter* v. *Superior Court* (Cal.) 19 Pac. 174.)

In conclusion, it is our opinion that the order of the district court reversing the previous order sustaining the defendants' motion for judgment on the pleadings was beyond the jurisdiction of the court. As a result, we conclude that the court had no power to make it, and that the petitioners here are entitled to the writ prayed for. Let the writ issue.

Writ granted.

PEMBERTON, C. J., and PIGOTT, J., concur.

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21	119
21	109
22	450
22	452
22	453
22	458
22	462
f22	518
21	109
24	70

WILLIAM BECK, APPELLANT, *v.* WILLIAM O'CONNOR AND WALTER COOPER, RESPONDENTS.

[Submitted May 3, 1898. Decided May 9, 1898.]

Rules of Court—Briefs—Mining Lease—Rights of Lessees.

1. RULES OF COURT—*Briefs.*—An appeal will be dismissed when appellant's brief does not contain a statement of the case, a specification of the errors relied upon, and instructions given or refused upon which error is predicated, as directed in Rule 5.
2. The lessees of a mine, who also had a bond for title to the same, assigned five-sevenths interest in the lease and bond to "O." upon the condition that he should carry out and perform the covenants of the lease and the condition of the bond; afterwards the lessees assigned the remaining two-sevenths of the lease and bond to the plaintiff, who then assigned one-third thereof to the defendants for $4,250, part of which was paid in cash, the remainder to be paid when the defendants could ascertain that the interest which they had bought was free and clear from all liens and incumbrances. "O" did all the work upon the claim required by the lease. *Held*, in an action to recover the remainder of the purchase price, that "O" had a lien upon plaintiff's interest in the property, and that defendants could recover the money which they had advanced to plaintiff as part of the purchase price for his interest.

Appeal from District Court, Carbon County; Frank Henry, Judge.

ACTION by William Beck against William O'Connor and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Statement of the case by the justice delivering the opinion.

This is an action to recover the sum of $1,250, which plaintiff claims to be due as a balance of the purchase price of an interest in a bond and lease sold by him to the defendant O'Connor in and to certain mining property mentioned in the complaint.

From the record it appears that on the 24th day of September, 1891, George W. Stapleton and others leased to Henry Addoms and Mark Welch a mining claim in Silver Bow county, known as the "Spur Lode Mining Claim," for the term of one year. By the terms of said lease, the lessees bound themselves and their assigns to take possession of the

leased premises, and work and mine the same in an economic, proper, and miner-like manner, and especially to sink an incline, which had already been sunk on said premises 200 feet, an additional depth of 100 feet, of the same size as the incline already constructed, and to properly timber the same. It was provided in said lease that the lessees should work the property continuously during the term of the lease, and that a failure to work it for a period of ten consecutive days should operate as a forfeiture of the lease. The lease also provided that a failure on the part of the lessees to comply with any of the terms or covenants contained therein should work a forfeiture thereof. The lessors, at the time of the execution of the lease, executed to the said Addoms and Welch a bond for a title to the leased property, upon the condition that the said Addoms and Welch should pay to them the agreed purchase price within the time specified in said bond. Thereafter Addoms and Welch assigned to L. B. Olds an undivided five-sevenths interest in the lease, and in all the estate, right and title acquired thereunder, upon the condition that said Olds comply with the covenants and terms of said lease, and at the same time assigned to said Olds the undivided five-sevenths interest in and to the title bond above mentioned, together with a five-sevenths interest in all rights, title and estate to be acquired thereunder, upon condition that Olds would carry out and perform the conditions of said bond. Olds immediately entered into possession of the leased premises, and commenced to work and mine the same, in accordance with the terms of the lease. Addoms and Welch never did any work on the leased premises. In February, 1892, Addoms and Welch conveyed by quitclaim deed to the plaintiff, William Beck, a two-sevenths interest in and to the lease and bond mentioned above. Such interest was conveyed to Beck without the written consent of said lessors.

On the 15th day of March, 1892, Beck entered into a written contract with defendant O'Connor, by which he sold to O'Connor a one-third of the two-sevenths interest in and to the lease and bond in question, for the sum of $4,250, $3,000 of

which was paid, leaving the balance for which this suit is brought to be paid as soon after June 15th following as the said O'Connor could determine that the interest he had purchased of Beck in said lease and bond was free and clear of all charges, incumbrances, liens and assessments, of whatever nature or kind. Thereafter O'Connor, it is alleged, ascertained that there were incumbrances, liens and assessments upon the interest and title to the lease and bond sold to him by the plaintiff, amounting to a sum largely in excess of the amount sued for, and notified the plaintiff thereof, and demanded that he remove said liens and incumbrances, or execute to him security to hold him harmless against such liens and assessments, and declined to pay the sum sued for, unless the plaintiff would remove such liens and assessments upon the interest purchased in the lease and bond, or give to him the indemnity demanded. The plaintiff refused either to discharge the liens and assessments against the interest in the lease and bond sold to the defendant O'Connor, or to indemnify him as demanded.

After the commencement of this suit against O'Connor, O'Connor answered, setting up substantially the facts as aforesaid, and alleging that, in purchasing the interest in the lease and bond mentioned, he acted solely as the agent of defendant Cooper, disclaiming any interest personally in the matter, and asking that Cooper be made a party to the suit. Thereupon the court made Cooper a defendant, who answered, setting up substantially the same facts as those contained in the answer of O'Connor, and asked judgment against the plaintiff for the sum of $3,000 and interest, which sum had been paid to the plaintiff for the interest in the bond and lease sold to the defendant, on the ground that the title of the plaintiff to the interest in the lease and bond conveyed had wholly failed.

The cause was tried with a jury, and a verdict rendered in favor of defendants for the sum of $3,000, upon which verdict judgment was duly entered. From the judgment and an order refusing a new trial, the plaintiff appeals.

J. L. Staats, for Appellant.

The testimony is uncontradicted that the plaintiff had no voice or no hand in the management or development of the property by Olds; that he stood as a tenant in common; that he was not a partner of any of the members of the Cooper syndicate, referred to by him in his testimony in the management of the property, and could not be bound by authority of law for any share of the expenditures made on the common property without his consent. Plaintiff, as co-tenant with them as owners of the property, would not be liable for any share of the expenses for any improvement or development of the property without his consent and an agreement on his part to so contribute. A lien for such labor could only be enforced against the interest of the contracting party. (See *Rico Reduction and Mining Company* v. *Musgrave and others*, (Colo.) 23 Pac., 458. This case is directly in point. Also, *Mellor* v. *Valentine*, Colo. 3, 255; *Williams* v. *Canal Company*, (Colo.) 22 Pac. Rep. 806.) The only theory that the defendants in this case can adopt in order to hold plaintiff responsible for a share of the expenditures, made upon the property in controversy, in proportion to the plaintiff's interest in the same, is that it is so far as the owner of the property is concerned, a mining partnership; defined by the Civil Code, Section 3350, as follows: "A mining partnership exists when two or more persons, who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom, actually engage in working the same." The court will notice that being actually engaged in working the mine, is essential, otherwise the owners of the mine are simply tenants in common. (*Dougherty* v. *Creary*, 30 Cal. 290; *Septembre* v. *Putnam*, (*Id.*) 490; *Henderson* v. *Allen*, 23 Cal. 519; see *Skillman* v. *Lachman*, (*Id.*) 118, as bearing somewhat on the definition of mining partnership; see 81 Cal. 14; 89 Cal. 367.) So far as this proposition is concerned, we need not go farther than the decisions of this court. (See *Anaconda Copper Mining Co.* v. *B. M. Co.*, (Mont.) 43, Pac. Rep. 924.) It will be noticed in this case that the plaintiff Beck, nor his immediate assignors of the leases from Stapleton and others to

them, did not in any sense, render them partners, in owning their several interests in the mine in controversy, but that the assignees simply agreed to work the mine for a compensation out of the products of the mine, or in other words to pay a royalty of 25 per cent. upon the product realized from the mine is not a lease, although denominated by that term. A contract by which a party agrees to work a mine and share the expenses and bear his portion of the expenses and receive a share of the product as compensation, does not constitute him a mining or general partner; nor is the contract a lease, though denominated by that term. (*Stewart* v. *Adams*, (Cal.) 26 Pac. Rep. 970; *Houdepoll* v. *Liberty Hall Co.*, (Cal.) 22 Pac. Rep. 339, (80 Cal., 558.)

So that while under Section 3353, of the Civil Code, each member of a mining partnership has a lien on the partnership property for debts due creditors thereof, yet if the so-called syndicate, as testified by witness Cooper, was not a mining partnership, the statute could not be invoked for the enforcement of this so-called lien for assessments. Conceding, for the sake of argument, that the syndicate was a mining partnership, as defined by the Civil Code, which we deny, yet, defendant Cooper, who, for the purposes of defense, represents O'Connor, does not even claim he was a member of it; does not even claim that plaintiff ever authorized the labor to be done. So that under the testimony of defendant Cooper, who represents defendant O'Connor, no member of the syndicate, if it was a mining partnership, had any special authority whatever to bind plaintiff Beck for any expenses incurred by the syndicate through Olds, their manager, and unless Olds and the syndicate were specially authorized by Beck to incur these expenses, the plaintiff would not be liable, unless ordinary partners, which is not claimed. (See § 3358, Civil Code, *Jones* v. *Clark*, 42 Cal. 181; *Skillman* v. *Lachman*, 23 Cal. 198.) But instead of the arrangement being a mining partnership, they are not even tenants in common in the mine itself, but as above stated only tenants in common of the products of the mine, until a division is made according to the

contract. If this is true, no lien could attach to the mine itself under such a contract. (See on this proposition the following authorities: *Bernal* v. *Hovious*, 17 Cal. 542; *Smith* v. *Touksberry*, 20 Ala. 212; *Pander* v. *Rhea*, 32 Ark. 435; *Somer* v. *Joyce*, 40 Conn. 592; *Scott* v. *Ramsey*, 82 Ind. 330; *Dinehart* v. *Wilson*, 15 Barber, 597.)

Sydney Fox and *Campbell & Stark*, for Respondents.

If Olds and Beck had been ordinary owners of the title to the mining claim, and neither of them were under any obligations to perform labor or make expenditures, Beck's interest would not then be liable, but where the expenditures are compelled to be made to preserve the property, the co-tenant making them has an equitable lien on his co-tenants' interest therefor. (*Noon* v. *Jennings*, 179 Ind., 336; *Prentice* v. *Janssen*, 79 N. Y. 478; *Alexander* v. *Ellison*, 79 Ky. 148; *Jenkins* v. *Jenkins*, 5 Atl. 139; *Coffin* v. *Heath*, 6 Met. 76; Freeman on Co-tenancy, 322; *Eads* v. *Rutherford*, 16 N. E. 587; *Holbrooke* v. *Harrington*, 36 Pac. 365.)

PEMBERTON, C. J. We have felt very much inclined to dismiss this appeal on account of the utter failure of counsel to comply with the rules of court in relation to the preparation of his brief.

Subdivision 3 of Rule 5 is as follows: "Contents of brief. This brief shall contain, in the order here stated: (1) A concise abstract or statement of the case, presenting succinctly the questions involved, and the manner in which they are raised, which abstract shall refer to the page numbers in the transcript in such manner that pleadings, evidence, orders and judgment may be easily found. (2) A specification of errors relied upon, which shall set out separately and particularly each error asserted and intended to be urged. When the error alleged is to the admission or to the rejection of evidence the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged

is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused."

Counsel has absolutely ignored this rule. The brief contains no proper statement of the case, no specifications of errors, nor any instruction given or refused of which counsel complains. As a consequence, we have been compelled to go over and over, through and through, time without number, a poorly prepared bunglesome transcript, to find the matters complained of by counsel. Such utter disregard of the rules of court by an appellant in this respect will in the future be punished by a dismissal of the appeal. We must either punish such seeming contempt for the rules of court, or abolish them.

At the trial of this case, the court permitted the defendants to prove the terms and conditions of the lease and bond from Stapleton and others to Addoms and Welch, under which the plaintiff claimed title to the interest therein sold to defendants, for the purpose of showing that it was absolutely necessary, under such terms and conditions of said lease, for Olds to do the work he performed, and make the expenditures he did, to keep alive his own and plaintiff's interest and title under the lease to the leased premises, and that, if Olds had not done such work on said premises, plaintiff's interest and title under and to the lease and bond would have wholly failed. It is not claimed that plaintiff ever did any work or expended any money to preserve the title to or under the lease and bond which he sold to defendants, but that Olds did preserve and keep alive such title by his work and expenditures on the leased premises under the lease. The court instructed the jury that, under such circumstances, Olds had a claim against plaintiff for his share of the work and expenditures, and was entitled to a lien against his interest in the leased premises acquired under and by the assignment of the two-sevenths interest of the lease and bond by Addoms and Welch. To the admission of this evidence and the giving of such instructions, the plaintiff excepted, and assigns such action of the court as error.

Counsel contends that plaintiff and Olds were co-tenants of the leased premises, and that he was not liable for any expenditures Olds might or did make thereon. If plaintiff and Olds had been the owners as co-tenants of the premises in controversy, the argument of counsel that one co-tenant could not incumber the interest of another by work or expenditures thereon would have been pertinent, and perhaps conclusive. But we have a different case. here. Whatever interest Olds had or the plaintiff acquired was under the lease from Stapleton and others to Addoms and Welch. In order to preserve any interest under the lease, the leased premises had to be worked continuously by the lessees or their assignees. Olds did work the leased premises continuously, and made large expenditures thereon, to preserve the leasehold estate; and such work and expenditures necessarily inured to the benefit of plaintiff. Plaintiff became a party to the lease by purchase from Addoms and Welch, and was bound by its terms. He could not, in equity, appropriate the benefits resulting from the work and expenditures of Olds on the premises without becoming liable for his share of the work and expenditures necessary to preserve the leasehold estate. Therefore Olds had a claim against plaintiff, and was entitled to a lien on his interest therein for his share of such work and expenditures. (*Prentice* v. *Janssen*, 79 N. Y. 478; *Jenkins* v. *Jenkins*, (N. J. Ch.) 5 Atl. 134; *Eads* v. *Retherford*, 16 N. E. 587, and authorities cited; *Holbrooke* v. *Harrington* (Cal.) 36 Pac. 365; Freeman on Co-Tenancy, 322.) The amount chargeable to the interest of plaintiff in the premises was far in excess of the amount sued for. Plaintiff, it is conceded, refused to pay this sum or discharge the lien Olds was entitled to against the interest sold to defendants, by reason whereof plaintiff's title to the premises and to the interest in the lease and bond sold to the defendants wholly failed. Under such circumstances, plaintiff had no right of action against the defendants or either of them, and they were certainly entitled to recover the money they had paid for a title that had wholly failed. Plaintiff's contract bound him to convey a good title.

He did not do it. He refused to perform the conditions and terms of the Stapleton lease upon which the preservation and completion of the title he sold depended.

There are other assignments of error, but, being of the same character, they are necessarily determined by the above treatment of the main question involved. We think the case was fairly tried and determined upon its merits.

The judgment and order appealed from are affirmed.

Affirmed.

HUNT and PIGOTT, JJ., concur.

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WILLIAM BECK, APPELLANT, v. W. Y. FRANSHAM ET AL., RESPONDENTS.

[Submitted May 3, 1898. Decided May 9, 1898.]

Injunctions Against Judgment—Remedy at Law.

1. Where a judgment debtor appeals from the judgment, and his appeal is dismissed because of his neglect to have the sureties on the undertaking on appeal justify within the time allowed by law, an injunction to prevent a sale of property under an execution issued upon the judgment is properly refused.
2. One court will not enjoin the enforcement of the execution issued upon a judgment of another court of concurrent jurisdiction, unless the latter court for lack of jurisdiction, cannot grant the relief desired.

Appeal from District Court, Gallatin County; F. K. Armstrong, Judge.

ACTION by William Beck against W. Y. Fransham and others. From an order dissolving a temporary restraining order, plaintiff appeals. Affirmed.

Statement of the case by the justice delivering the opinion.

Injunction. Plaintiff prayed the district court of the Ninth judicial district to enjoin defendants from selling certain property of plaintiff situate in Gallatin county, pursuant to

the terms of an execution issued in favor of defendants, and against plaintiff, by the district court of the Sixth judicial district, in and for Carbon county, in the action of *Beck* v. *O'Connor*, reported *ante*, p 109, 53 Pac. 94. In his complaint, filed July 1, 1897, plaintiff sets forth that in said action of *Beck* v. *O'Connor*, his motion for a new trial having been overruled, he perfected his appeal to the supreme court by filing the requisite notice and undertaking, and also filed a *supersedeas* bond to stay proceedings in said cause in double the amount of said judgment, with costs, and filed the transcript of said cause with the clerk of the supreme court, but that, notwithstanding his appeal to the supreme court, the clerk of the district court of Carbon county, in the Sixth judicial district, without authority of law, did issue a pretended execution directed to the sheriff of Gallatin county in the Ninth judicial district, requiring him to make the sum due on the said judgment out of the property of plaintiff in Gallatin county, and that, in pursuance thereof, defendant Fransham, as sheriff, levied upon certain property of plaintiff in Gallatin county, and was about to sell the same.

On July 1, 1897, Judge Armstrong, presiding judge of the Ninth judicial district, issued a temporary restraining order, and an order to show cause, making the same returnable August 2d. On July 17th the matter was heard by Judge Armstrong, and defendants' motion to dissolve the temporary order was sustained; and further proceedings were stayed for five days, to allow plaintiff to file a bond in the sum of $800, and, upon filing said bond, the injunction was to be continued in force. Plaintiff did not give the bond last referred to, and appeals from the order of the district court dissolving the temporary restraining order.

J. L. Staats, for Appellant.

Sidney Fox and *A. J. Campbell*, for Respondents.

HUNT, J. The order of the lower court dissolving the temporary restraining order must be affirmed on two grounds:

First. The appellant here, who was the plaintiff in the action entitled "*Beck* v. *O'Connor*," had a perfectly plain, speedy, and adequate remedy at law by appeal from the judgment and order denying his motion for a new trial in that suit, and by executing a written undertaking, with two or more sureties, to the effect that they were bound in double the amount named in the judgment or order appealed from and costs. (Code of Civil Procedure, § 1726.) But, as appears by the records of this court, it was held that appellant was guilty of *laches* in his appeal in that action by failing to have the sureties on the appeal bond justify within twenty days after exceptions to their sufficiency had been duly filed by the respondents here, defendants in the action referred to. Appellant subsequently moved this court, by motion filed June 14, 1897, for leave to file a new undertaking on appeal in said suit, and to permit a justification of the sureties thereon before this court, and to stay proceedings upon the judgment rendered in that suit by the district court of the Sixth judicial district in and for Carbon county, pending the determination of the appeal by this court. Counsel for appellant and respondents in that action filed briefs upon that motion, and thereafter, on July 10, 1897, we denied the plaintiff's motion to file a new undertaking. This order was, in effect, a refusal to permit execution to be stayed. Such being the condition of the case, plaintiff's omission to comply with the law in respect to his undertaking in the suit of *Beck* v. *O'Connor* cannot be cured by the aid of a court of equity in enjoining the levy of execution issued in that case.

High on Injunctions (Section 173), in discussing the general doctrine denying relief by injunction against the enforcement of a judgment, says: "And upon this point the rule is well established that courts of equity will not lend their aid, by injunction, against the enforcement of judgments when a sufficient remedy exists by appeal or writ of *certiorari* to revise the proceedings at law. A plain, adequate and specific remedy existing by appeal, he who is dissatisfied with a judgment must pursue that remedy, and will be denied relief by injunc-

tion when no sufficient reason is shown why the remedy at law is not pursued.''

Second. It is well established that one court is without power to interfere with the judgments or injunction orders of another court of concurrent jurisdiction, unless it may be the court in which the suit is pending cannot, for lack of jurisdiction, grant the relief desired. The following authorities are in point: *Crowley* v. *Davis*, 37 Cal. 268; *Anthony* v. *Dunlap*, 8 Cal. 26; *Scott* v. *Runner* (Ind.) 44 N. E. 755; Works on Jurisdiction, p. 69; Beach on Injunctions, § 648.

The appellant having presented no case for injunction, the lower court correctly dissolved the temporary order.

Affirmed.

PEMBERTON, C. J., and PIGOTT, J., concur.

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JOHN MURRAY, APPELLANT, v. S. T. HAUSER (IMPLEADED WITH OTHERS), RESPONDENTS.

[Submitted May 3, 1898. Decided May 9, 1898.]

Service of Statement—Presumption of Regularity—Jurisdiction—Findings by Court, After Disagreement of Jury—Preparation of Statement.

1. SERVICE OF STATEMENT—*Presumption of Regularity.*—When the Judge, or Court, has allowed and settled a statement on motion for a new trial, unless the contrary appears in the record, the presumption is that service of the proposed statement was made, and that all requirements of the law for settlement of the same were had.
2. In an action at law to recover damages for the breach of a contract, after the case has been submitted to the jury which failed to agree upon a verdict, the Court cannot make findings of fact and conclusions of law and base a judment thereon; but should direct that the case be tried again, in accordance with the provisions of Section 269 of the Code of Civil Procedure.

N. B.—The Court criticizes the form of and matter contained in the statement on motion for new trial.

Appeal from District Court, Lewis and Clarke County; H. N. Blake, Judge.

ACTION by John Murray against S. T. Hauser, impleaded with Howard Oviatt and F. D. Spratt. From a judgment for defendant Hauser, plaintiff appeals. Reversed.

Shober & Rasch and *E. H. Goodman*, for Appellant.

Our contention is that the court erred in refusing to submit to the jury a general verdict, as asked for by plaintiff. This is an action for the recovery of money. The law in force at the time of the trial of this case was as follows: "In an action for the recovery of money only, or specific property, the jury, in their discretion, may render a general or special verdict." (§ 275, Code of Civil Procedure, 1st Division, Compiled Statutes of Montana, 1887.) The court, of its own motion, however, and against the objections of plaintiff, submitted to the jury three special findings, and directed the jury to find thereon, thereby depriving the jury of their discretionary right to find a general verdict. The Colorado Supreme Court, construing a section of the Colorado Code, identical with section 275, *supra*, say: "In section 181, Civil Code, it is provided: 'In an action for the recovery of money only, or specific property, the jury, in their discretion, may render a general or special verdict. * * * The court had no power to order special findings.'" (*Meyers* v. *Hart*, 33 Pac. Rep. p. 649; citing *Thompson* v. *Gregor*, 11 Colo. 534, 19 Pac. 461; see also *American Co.* v. *Bradford*, 27 Cal. 361; *Schultz* v. *Cremer*, 59 Ia. 182; *Heffner* v. *Brownell*, 78 Ia. 648.) The court erred in determining, without the consent, and against the objections of plaintiff, the issues of fact involved in said cause, in favor of defendant, without having the same tried and determined by a jury, thereby depriving plaintiff of his right to a trial by jury.

This is an action upon a contract, and the terms of the statute in force at the time of the trial of this cause are imperative, to-wit: "In actions * * * for money claimed as due upon contract, or as damages for breach of contract, * * * an issue of fact must be tried by a jury, unless a jury trial is waived." (§ 250, Code of Civil Procedure, 1st

Division Compiled Statutes of Montana, 1887; 3 Greenleaf on Evidence, §§ 261-266, 339; Hayne on New Trial and Appeal, § 234.) The jury, having disagreed, plaintiff was entitled to a new trial, immediately then, or at a future time. (§ 268, Code of Civil Procedure, 1st Division Compiled Statutes of Montana, 1887.) The issue raised was this: In the execution of the contract of guaranty, did the defendant Hauser act as the representative of the Murray Placer Mining Company, or in his personal and individual capacity? The existence or non-existence of that relationship was a question of fact for the jury. (1 Thompson on Trials, § 1368; Proffat on Trials, § 274; *Montgomery* v. *Sayre*, 91 Cal. 206; Am. and Eng. Enc. of Law, Vol. I, 2d Ed. p. 967, and note 4.) And when, in an action of this kind, without a waiver of trial by jury, by consent of the parties, the court substitutes itself for the jury, and, passing upon the effect of the evidence, finds the facts involved in the issues, and renders judgment thereon, the same is reversible error. (*Baylis* v. *Travelers' Ins. Co.*, 113 U. S. 316; *Johnson* v. *Goodtime*, 1 Wash. Ter. 484; *Montgomery* v. *Sayre*, 91 Cal. on pp. 210-211.) There are a large number of additional assignments of errors mentioned in the transcript, but we deem a discussion of them unnecessary for a reversal of this case. From the points herein enumerated, it clearly appears that there was manifest error committed by the court on the trial of this case, and for that reason the case should be reversed and remanded for a new trial.

Toole & Wallace, for Respondent.

The utter failure to serve the statement was fatal, unless waived, and it was not waived in this case. (*Walsh* v. *Mueller*, 35 Pac. (Mont.) 226.) Independent of the non-service, the unexplained delay of over sixty days in presenting the statement was fatal. (*Woodward* v. *Webster*, 50 Pac. Rep. (Mont.) 791, 792, right foot, 793, left top.) Independent of the above suggestion, all the alleged errors, if errors there were, would be harmless and utterly without injury, because of the controlling principle of law that the question of the

construction and meaning of the written contract of guaranty, made the basis of recovery in the action, quoted on page 3, appellant's brief, was purely a question of law for the court, and the case never should have been submitted to a jury in the first instance. (*Merriam* v. *United States*, 107 U. S. 437; *Goddard* v. *Foster*, 17 Wallace, 123, (21 Co-Op. Ed., 595, left foot); *C. C. Co.* v. *Fogg*, 53 Fed. 72, 75; 1 Beach on Modern Law of Contracts, §§ 743, 744, pp. 902, 903; §§ 3137, 3134, 3132, Code of Civil Procedure; §§ 632, 630, 628, Code of Civil Procedure, Compiled Statutes, 1887; *Toomey* v. *Atoye*, 32 S. W. 254, 256.) The only exception to this rule is in the case of trade or art terms. (17 Wallace, *supra; Penn* v. *Pomeroy*, 21 D. C. 243.) And no question as to the exception is presented by this case.

PIGOTT, J. John Murray brought this action against Howard Oviatt, F. D. Spratt and S. T. Hauser, to recover $16,083, besides interest, as damages for breaches of certain contracts entered into on December 19, 1891. Defendant Hauser alone appeared. He is sued as the guarantor of performance by Oviatt of the terms of the contract between Murray and Oviatt with respect to the Murray Placer Mining Company, a corporation, its property, and shares of its capital stock.

The contract of guaranty is as follows: "The said Samuel T. Hauser, for and in the interest of the Murray Mining Company, hereby guarantees the complete fulfillment of the above memorandum of agreement on the part of the said Howard Oviatt, to purchase said shares above mentioned of said John Murray at the price thereupon agreed and stipulated to be paid, and the full compliance of said Oviatt with the terms of this memorandum of agreement in every particular. Witness my hand and seal this 19th day of December, A. D. 1891. S. T. Hauser. [Seal.]"

In the opinion of the trial court, issues of fact were made by the pleadings, by which, among other things, plaintiff alleged that the guaranty was understood and intended as a contract binding upon Hauser personally, and that Hauser was

not authorized to execute a guaranty in behalf of the Murray Placer Mining Company, and that the Murray Mining Company mentioned in the guaranty was not the Murray Placer Mining Company named in the contract between Murray and Oviatt, while defendant Hauser pleaded, among other things, that the guaranty was executed by him as agent for the Murray Placer Mining Company, and that it was expressly understood and agreed between plaintiff and defendant that the guaranty was made for and on behalf of the company, and that it was not in any way to bind Hauser personally or individually. A jury were sworn to try the case. Each party introduced evidence, which the court submitted to the jury, with instructions to find upon certain special issues; refusing to direct the jury to return a general or special verdict. The jury disagreed and were discharged, and thereupon, on motion of defendant, and over the objection and exception of plaintiff, the court made the following findings and conclusions:

"The court—as its findings of fact in the above action—from the evidence introduced in the case, determines: (1) That the words 'Murray Mining Company,' used in the guaranty sued on, attached to Exhibit B in the complaint, were intended by the parties to mean the 'Murray Placer Mining Company,' the corporation of that name referred to in the complaint, answer and replication.

"(2) That, in executing the above guaranty for and in the interest of the Murray Placer Mining Company, the defendant S. T. Hauser executed the same, not as his personal act, but as the act of the Murray Placer Mining Company, and that the guaranty was intended by the parties at the time, and executed, as the guaranty of the Murray Placer Mining Company, through its representative, Hauser.

"(3) That this condition was fully understood and known by the plaintiff, John Murray, and that, in and about the whole transaction in connection with which the guaranty was executed, it was known and understood that the defendant Hauser acted in a representative capacity for the company aforesaid, and not personally.

"And, as conclusions of law on the foregoing, the court finds that the contract sued on created no obligation to the plaintiff on the part of the defendant Hauser personally, and that no judgment against Hauser personally could be rendered thereon, and that, therefore, judgment in this action should be ordered for the said defendant Hauser."

Judgment was entered for defendant Hauser, and a new trial refused. Plaintiff appeals.

1. Defendant insists that the statement on motion for a new trial must be disregarded, for the reason that it was never served, and service was not waived. The record does not expressly disclose service, or a waiver thereof; but the judge below has settled the statement, and certified that it is correct. Subdivision 3, Section 1173, Code of Civil Procedure, requires the party moving for a new trial to serve a draft of the proposed statement upon the adverse party, as a prerequisite to its settlement. Settlement without such service, or a waiver thereof, would have been, at the least, an irregularity. In the absence of evidence to the contrary, the presumption of regularity and due performance attends official acts. When, therefore, the judge or court has allowed and settled a statement on motion for a new trial, the presumption arises that service was made, and that all steps prescribed for settlement were taken. (*Young* v. *Rosenbaum*, 39 Cal. 646; *Sullivan* v. *Wallace*, 73 Cal. 307, 14 Pac. 789.) Of course, this presumption is inconclusive, and may be rebutted by proof in the record to the contrary. No such proof appearing in this case, the presumption prevails that the statement was served in proper time, and was settled upon due notice. Nothing in *Walsh* v. *Mueller*, 14 Mont. 76, 35 Pac. 226, or in *Woodward* v. *Webster*, 20 Mont. 279, 50 Pac. 791, supports the contention of defendant.

2. This is an action for money claimed as damages for breach of a contract. Prior to the introduction of the so-called reformed procedure, it would have been called an action at law, as distinguished from a suit in equity; and for convenience it may be now so designated, since it is based upon a

legal wrong, and seeks the remedy of a money judgment only. At the common law, as well as under the provisions of Section 250 of the Code of Civil Procedure (Comp. St. 1887), then in force, the parties were entitled to trial by jury of the issues of fact in such an action. If the evidence conflicts, the jury, and not the court, may weigh and decide. If, upon trial, there should be no substantial conflict in the evidence, and the inferences to be drawn from it were such that reasonable men could come to but one conclusion thereon, the case is stripped of questions of fact, and a mere question of law remains for the decision of the court (*Helena National Bank* v. *Rocky Mountain Tel. Co.*, 20 Mont. 379, 51 Pac. 829.); and in that event, if defendant were entitled to prevail, under our practice the court might, upon trial, instruct the jury to find a verdict for defendant, which would be equivalent to nonsuiting plaintiff, (*McKay* v. *Montana Union Ry. Co.*, 13 Mont. 15, 31 Pac. 999), or might dismiss the complaint by ordering a direct nonsuit; or it might, perhaps, withdraw the case from the jury, and itself decide the question of law, without resorting to nonsuit, or the formality of a verdict by the jury (*Emerson* v. *Eldorado Ditch Co.*, 18 Mont. 247, 44 Pac. 969); or, lastly, it might submit the case to the jury, with instructions to find for defendant if they believed the evidence adduced. No other method, however, of disposing of such a case, is sanctioned by established practice. The court did not adopt any of these methods. The case was first submitted to the jury to find upon three special issues only, although Section 275 of the Code of Civil Procedure (Comp. St. 1887) expressly authorized them to render either a general or a special verdict, in addition to finding upon the special issues submitted by the court. The disagreement of the jury, and their discharge, resulted in a mistrial. There was no trial by jury. That which would have been a trial, had the jury rendered a verdict, became a nullity. The parties were therefore restored to the same position they occupied before the trial was essayed, and the case thus resumed its former status. What had been received in evidence upon a proceeding that

had terminated, and had resulted in nothing, could no longer be considered as evidence. Immediately upon the discharge of the jury, the evidence adduced ceased to be before the court; nor was it in the breast of the judge. It was, for the purpose of such trial, *functus officio*. Section 269 of the Code of Civil Procedure (Comp. St. 1887), which provides that, where a jury are discharged after the cause is submitted to them, the action may be again tried, immediately or at a future time, as the court shall direct, indicates with precision the general rule to be followed in such case; and we think that course should be pursued in all actions at law, falling within the provisions of said section 250, in which a mistrial occurs. (See *Montgomery* v. *Sayre*, 91 Cal. 206, 27 Pac. 648.) If the evidence were reduced to the form of an agreed statement of facts, it would be, in effect, a special verdict, and, as such, part of the judgment roll, (*Hartman* v. *Smith*, 7 Mont. 19, 14 Pac. 648), and, of course, the intervention of a jury would be useless, since a question of law, only, would thereby be presented for determination; and where the evidence adduced on the trial is without contradiction, and necessarily establishes the facts in favor of one party, it is, for the purpose of that trial, tantamount to an agreed statement of facts; and this court has so held in *Emerson* v. *Eldorado Ditch Co.*, *supra*. But such uncontradicted evidence has the effect of an agreed statement only for the purposes of the trial at which it is received, and cannot be so treated in a subsequent trial. Its effect as a special verdict or finding must be limited to the trial at which the evidence is adduced, and may not be used thereafter to prevent either party from availing himself of other evidence; and this is true when the evidence is uncontradicted, as well as when there is a dispute as to the facts, unless the right to trial by jury be waived, and the cause submitted to the court upon the evidence received upon the mistrial. The court may not substitute itself in place of a jury, and pass upon the effect of evidence which, because of a mistrial, is no longer before it. If, immediately after a mistrial, the court may, without consent of parties, try and determine

the cause upon the evidence produced upon the mistrial, no reason is apparent why the court could not properly exercise its supposed authority in that behalf at any time, however long, thereafter. Through the lapse of years, or until the court decided the case, the evidence would remain in the breast of the judge. We do not think this theory is in harmony with the right of trial by jury.

In the case of *Baylis* v. *Travellers Insurance Co.*, 113 U. S. 316, 5 Sup. Ct. 494, the court said: "If, after the plaintiff's case had been closed, the court had directed a verdict for the defendant on the ground that the evidence, with all inferences that the jury could justifiably draw from it, was insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, it would have followed a practice sanctioned by repeated decisions of this court—and in that event the plaintiff having duly excepted to the ruling in a bill of exceptions setting out all the evidence upon a writ of error, would have been entitled to the judgment of this court whether, as a matter of law, the ruling against him was erroneous. Or if, in the present case, a verdict having been taken for the plaintiff by direction of the court, subject to its opinion whether the evidence was sufficient to sustain it, the court had subsequently granted a motion on behalf of the defendant for a new trial, and set aside the verdict, on the ground of the insufficiency of the evidence, it would have followed a common practice, in respect to which error could not have been alleged; or it might, with propriety, have reserved the question what judgment should be rendered, and in favor of what party, upon an agreed statement of facts, and afterwards rendered judgment upon its conclusions of law. But without a waiver of the right of trial by jury, by consent of parties, the court errs if it substitutes itself for the jury, and, passing upon the effect of the evidence, finds the facts involved in the issue, and renders judgment thereon. This is what was done in the present case. It may be that the conclusions of fact reached and stated by the court are correct, and, when properly ascertained, that they require such a judgment as

was rendered. That is a question not before us. The plaintiff in error complains that he was entitled to have the evidence submitted to the jury, and to the benefit of such conclusions of fact as it might justifiably have drawn—a right he demanded, and did not waive—and that he had been deprived of it by the act of the court in entering a judgment against him on its own view of the evidence, without the intervention of a jury. In this particular we think error has been well assigned. The right of trial by jury in the courts of the United States is expressly secured by the Seventh Article of Amendment to the Constitution, and Congress has, by statute, provided for the trial of issues of fact in civil cases by the court without the intervention of a jury only when the parties waive their right to a jury by stipulation in writing. * * * This constitutional right this court has always guarded with jealousy."

As has already been indicated, the practice in this state touching the methods by which the court may, upon trial, dispose of an action at law, is somewhat more liberal than the practice prevailing in the federal courts. We are, however, of the opinion that in this state the court must act while the evidence in an action at law is before it, and is without right to decide the case upon the evidence after the disagreement and discharge of the jury.

It is neither necessary nor proper to consider the other assignments of error. The court below was without right to decide the case as if the evidence were before it. No trial, such as is contemplated by the statute, was had. Plaintiff is entitled to a trial upon whatever issues of law or fact are presented. Our investigation has been confined to the mode of procedure adopted by the trial court in this case. All other questions are reserved.

The transcript filed in this court is not one which should be followed as a model. Some exhibits are incorporated more than once, and much unnecessary matter has been included; for example, all instructions prayed by the plaintiff, and the charge of the court to the jury. We note, also, that a copy

of the undertaking on appeal is inserted, although it is not one of the papers required to be furnished. (Code of Civil Procedure 1895, §§ 1736-1739.) Such unnecessary matter imposes useless expense, sheds no light upon any question presented by the appeal, and tends to impede the court in its investigation of the case. The judgment and order appealed from are reversed, and the cause is remanded, with direction to the district court to grant a new trial.

Reversed and remanded.

PEMBERTON, C. J., and HUNT, J., concur.

TOWN OF WHITE SULPHUR SPRINGS, RESPONDENT, v. ALLEN PIERCE, COUNTY TREASURER, ETC., APPELLANT.

[Submitted May 5, 1898. Decided May 16, 1898.]

Municipal Corporations—Taxation—Duties of County Treasurer, as Collector—Right of Defendant to Object to Judgment, because it is too small.

1. MUNICIPAL CORPORATIONS—*Taxation.*—Under Sections 4860 and 4872 of the Political Code, a city or town council has power to levy taxes; and such taxes, when levied for street purposes, are not subject to the laws of 1887 providing that the taxpayers may work out street taxes if they so elect.
2. SAME—*Duties of County Treasurer.*—The county treasurer is authorized to collect the taxes of all towns and of all cities not of the first class, unless such cities or towns provide otherwise by ordinance. (§ 4870 Political Code.)
3. SAME.—When the county treasurer has collected the taxes of a town and refuses to pay the amount collected to the town treasurer, as provided in Section 4864, the town may recover the amount so withheld.
4. The defendant cannot complain of a judgment because it is not for the full amount to which plaintiff is entitled.

Appeal from District Court, Meagher County; F. K. Armstrong, Judge.

ACTION by the town of White Sulphur Springs against Allen Pierce, county treasurer. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Statement of the case by the justice delivering the opinion.

This action is brought by the plaintiff town to recover the sum of $1,222.23, the amount of street taxes levied by the plaintiff upon the property within the town for the year 1895, which sum was collected by the defendant, who is county treasurer of Meagher county, in which plaintiff town is situated, and who refuses to pay the same to plaintiff, claiming that said sum is a part of the county taxes of said county of Meagher. The case was tried before the district court upon an agreed statement of facts.

From this statement it appears that the aldermen of the plaintiff town, on the 16th day of August, 1895, adopted the following resolution: "Be it resolved by the board of aldermen of the town of White Sulphur Springs, Montana, that an *ad valorem* tax of two (2) mills on the dollar be, and is hereby, levied on all the taxable property within the town of White Sulphur Springs, Montana, upon the assessed valuation as returned by the assessor of Meagher county for the year 1895, in accordance with the provisions of Ordinance No. 15. Said tax is for street and alley purposes, and to be collected by the treasurer of Meagher county in accordance with the laws of Montana."

The tax so levied by the plaintiff town for street purposes amounted to the sum sued for, and it is conceded that the defendant, as county treasurer, collected the same, and that he refuses to pay it over to the plaintiff after demand, for the reason that he claims said money belongs to Meagher county.

The district court rendered judgment in favor of plaintiff for the sum in controversy, less 30 per cent., which the district court considered as belonging to the county. From this judgment the defendant appeals.

Smith & Gormly and *C. B. Nolan*, for Appellant.

Powell Block and *C. A. Spaulding*, for respondent.

PEMBERTON, C. J. Counsel for appellant contends that the town taxes in question were levied under Ordinance No. 15 of

the plaintiff town, and that the ordinance is void because it does not provide that the taxpayers of the town may work out their taxes if they so elect, and because it does not further provide for giving notice to the taxpayers of the time and place when and where such work may be done, as required by Sections 1852, 1853, 1854, Fifth Division, Compiled Statutes 1887, under which statutes counsel claims the ordinance was adopted.

We doubt very much whether the appellant has any such rights in this controversy as would enable him to set up the failure of the ordinance to include within its terms such provisions. Those provisions were prescribed for the benefit of the taxpayers. They might make this defense if the taxes were levied under an ordinance passed under the sections of the Compiled Statutes referred to. But the agreed statement of facts shows that the taxes in controversy were for the year 1895, and levied by the resolution of the board of aldermen of the plaintiff town, set out in the statement. It appears, therefore, that the taxes were levied under the codes, which took effect July 1, 1895, and not under any provisions of the Compiled Statute, of 1887. Section 4860 of the Political Code authorizes towns to levy such taxes. Section 4872 same code empowers the town council or board of aldermen to make such levy by resolution. This resolution of the board of aldermen levying the taxes was certified by the county clerk, who, in accordance with the law, carried this tax levy into the proper tax book, which he delivered to the county treasurer to collect. The county treasurer collects the taxes in all towns and cities except cities of the first class, unless such towns or cities not of the first class otherwise provide by ordinance. (Section 4870 Political Code.) The plaintiff town had not otherwise provided by ordinance for the collection of its taxes. The defendant, as county treasurer, collected the taxes levied as shown above. Having collected them, Section 4864 of the Political Code requires that he pay them over to the town or its treasurer. This he refused to do. We are shown no sufficient reason why he should refuse to comply with a plain

requirement of the law. The taxes were levied by the town, and collected by the appellant as town taxes.

Counsel for appellant says the judgment should be reversed because the district court only rendered judgment in favor of plaintiff for 70 per cent. of the amount of taxes collected, whereas it should have recovered for the full amount, if for any. The plaintiff is not complaining of this action of the court, and the appellant cannot complain if he got more by the judgment than he was entitled to. The appellant is not injured by the judgment. We think the judgment should be affirmed.

Affirmed.

HUNT and PIGOTT, JJ., concur.

STATE OF MONTANA, RESPONDENT, *v.* MARTIN BOWSER, APPELLANT.

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[Submitted May 9, 1898. Decided May 16, 1898.]

Information—Leave to File—Jury List—Presumption that Officers Have Acted in Accordance with Law—Rape—Evidence of Relation Between Defendant and Prosecuting Witness—Age, Evidence of—Cross-Examination—Age of Prosecuting Witness—Force—Instructions.

1. INFORMATION—*Leave to File.*—Under Section 8, Article 3, of the Constitution, and Section 1882, Penal Code, prosecutions in the district court may either be by information, in cases where there has been an examination and commitment or admission to bail by magistrate, in which case an order of the court is not necessary; or by information filed by order of the court upon the written motion of the county attorney, which may be done without such examination.
2. SAME.—Where the information is filed by leave of court, it need not be entered in writing before the filing of the information; but after the arrest of the defendant, the minutes of the court may be corrected so as to amend the order.
3. JURY LIST—*Presumption that Officers Have Acted in Accordance with Law.*—If the officials, whose duty it is to make up the jury list, purposely omit to put upon the jury list the names of persons competent and qualified to serve as trial jurors, a challenge should be sustained as to the whole panel. But the presumption is that the officials have done their duty and that the lists were properly made up, until the contrary is made to appear; and this presumption is not overcome by a mere offer of proof to the contrary not accompanied by an affidavit, and without calling a witness or asking leave to call one, and then tendering such proof.

4. RAPE—*Evidence of Relation Between Defendant and Prosecutrix.*—In a prosecution for rape, it is not error to allow the state to show that the defendant is the father of the prosecuting witness.
5. AGE—*Evidence of.*—In such an action, the prosecuting witness may testify as to her own age.
6. SAME.—Where the witness upon direct examination is testifying concerning her age, it is not error to deny the request of defendant to interrogate her as to her knowledge of her age; defendant being allowed to make such investigation upon cross-examination.
7. RAPE—*Age of Prosecuting Witness—Force.*—Under Section 450, Penal Code, in a prosecution for rape, the question of force is immaterial where the prosecuting witness is under 16 years of age.
8. RAPE—*Evidence of Force.*—Upon the evidence in this case, it was held that the evidence showed the rape was committed by force.
9. INSTRUCTIONS.—It is not error to refuse an instruction requested by the defendant, when the court has already correctly and fully instructed the jury on the same subject.

Appeal from District Court, Flathead County; Charles W. Pomeroy, Judge.

Martin Bowser was convicted of rape upon a child under 16 years of age, and he appeals. Affirmed.

Geo. H. Grubb and *H. G. Swany*, for Appellant.

C. B. Nolan, for Respondent.

HUNT, J. Defendant was convicted of rape upon a child under the age of 16 years. He was sentenced to the penitentiary for life, and appealed from the judgment and an order overruling a motion for a new trial.

1. Defendant specified as error the order of the court denying his motion to quash the information under which he was arraigned. The ground of this motion was that defendant had not been legally committed by a magistrate before the filing of the information. It was a fact not disputed that defendant never had had a preliminary examination, and never had waived any right to the same. The Constitution of the State, Section 8, Article 3, provides that: "Criminal offenses of which justices' courts and municipal and other courts, inferior to the district courts, have jurisdiction, shall, in all courts inferior to the district court, be prosecuted by complaint. All criminal actions in the district court, except those on appeal, shall be prosecuted by information, after examination and commitment, by a magistrate, or after leave granted by the

court, or shall be prosecuted by indictment without such examination or commitment, or without such leave of the court. * * *''

The Penal Code, Section 1382, supplements the constitutional provision quoted by separately recognizing the two instances where prosecution must be by information:

(1) In all cases where there has been an examination and commitment, and commitment or admission to bail, by a magistrate, on a charge of crime; or,

(2) In any case where there has been no examination or commitment or admission to bail, upon leave granted by the court for that purpose.

The information here expressly recites that ''* * * in open court, on the 20th day of April, A. D. 1896, comes the county attorney, first having obtained leave of the court,'' etc. This averment makes the information, on its face, a valid and constitutional exercise of the authority vested in the county attorney to file the written accusation.

We said in the case of *State* v. *Brett*, 16 Mont. 360, 40 Pac. 873: ''It is not necessary, in order to vest power in the county attorney to file an information, that there shall be a preliminary examination and commitment. He may act, after leave has been granted by the court, in a case like the one at bar, where there may not have been any charge or information before a committing magistrate.'' And we say now, further, that there can be no interpretation put upon any statute of the state which will take away the constitutional right of prosecution by information filed in the district court after leave has been granted by the court, where there has been no examination and commitment, or where there has been no prosecution by indictment.

The true construction of Section 1910 of the Penal Code is that an information must be set aside: First, if it be a fact that leave to file the same has not been granted by the court; or, second, if it be a fact that before the filing thereof the defendant had not been legally committed by a magistrate; and, third, that it was not subscribed by the county attorney, or attorney prosecuting.

Yet all of the facts enumerated in the first two of these subdivisions need not exist, as prerequisites to filing an information. To hold otherwise would be to destroy the meaning of the disjunctive clauses of the constitutional section heretofore quoted, which expressly authorizes prosecution by information filed by leave of court without examination and commitment, or, after examination and commitment, without the leave of court.

Section 1910 must therefore be construed, not as prescribing one indispensable method of procedure, and but one only, but as pertaining to the two constitutional methods of procedure where an information is filed, either one of which is indispensable, yet either of which is correct, as the conditions and facts of the case may warrant. Nothing in the case of *State* v. *Mansfield*, 19 Mont. 483, 48 Pac. 898, in any way conflicts with these views. The decisions of the California courts cited by appellant are also inapplicable, for the reason that the constitution and laws of that state do not allow the procedure of filing an information after obtaining leave of court.

In *State* v. *Brett*, *supra*, it was said: "In California, by Section 8, Article 1, of the Constitution, offenses shall be prosecuted by information, after examination and commitment; and by Section 995 of the Penal Code of California an information shall be set aside, if, before the filing thereof, the defendant has not been legally committed by a magistrate. (*People* v. *Christian*, 101 Cal. 471, 35 Pac. 1043.) Procedure like that of Montana, after obtaining leave of court, is not known to that state; and it is well to note that the annotations to Sections 1730 and 1910 of the Penal Code now in force are not made with relation to the proper effect to be given to the authorization in the Constitution of Montana permitting informations to be filed where leave of court has been obtained, without regard to whether there has been any preliminary examination before a magistrate."

The sequel of these views is that the court properly denied the motion to quash.

2. A second motion to quash was filed, based upon the ground that leave to file the information had not been granted by the court, because no order granting such leave was ever made or entered by the court as is required by law. To support this motion, A. W. Swaney, clerk of the court, swore, by affidavit dated April 23, 1896, "that the only orders made by the said court concerning the above-entitled cause are those on page 606 of the minute book or journal of said court; that no order in writing has ever been filed in said court or cause, by the district judge thereof, or any other person, granting leave to file an information charging the above-named defendant with the crime set forth in the information in said cause, or any other crime."

The court overruled defendant's motion, which action of the court is assigned as error. The orders made by the court, and referred to in Swaney's affidavit, are that "on motion of the county attorney it was ordered that the minutes of April 20, 1896, page 606, be corrected to read as follows: 'The county attorney in open court files and presents his motion to the court, asking for leave to file an information against one Martin Bowser.' Thereupon the court, after hearing and fully considering said motion, ordered that leave be granted the county attorney to file said information." Appellant's contention is that an order granting leave to file an information must be made in writing, and when so made must be entered and filed, and that, unless it is so made and entered, the filing of the information is a nullity, or the information may be quashed, under Subdivision 1 of Section 1910, Penal Code, *supra*. The point is not made that there was no leave of court at all obtained before filing the information, but that no order was made in writing, and none was entered; that is to say, that an oral order granting leave to a county attorney to file an information is not valid, and especially is it invalid if not entered in the clerk's minutes. The answer to this argument is that by the statute it is not necessary that the order of the court granting leave to file an information be an order in writing, other than an entry in the minutes of the court kept by the

clerk. The judge of the court speaks orally for the court, and orders that leave be granted. The judicial act is thus performed, and thereafter the ministerial duty of the clerk is to enter the order of the court. If the defendant is under arrest or in custody, it is doubtless the duty of the clerk to enter the order of the court granting leave at once; but if the defendant has not been arrested—and the presumption here is that he was not—under Section 1386, Penal Code, the clerk should not enter the order until immediately after the arrest. But the validity of the procedure by information is not destroyed, nor is the information rendered a nullity, by an omission of the clerk, unless it be a fact that leave to file the same has not been granted by the court. The procedure under the Criminal Code relating to the prosecution of criminal actions, in respect to orders for leave to file informations, is peculiar to our criminal practice. Its underlying reason is to render effective any proceedings taken against a person informed against, but not under arrest, by withholding from him and others, except those whose official duty it is to know the fact, knowledge and opportunity for knowledge that the county attorney has filed an information, and thus to prevent the defendant's escape. So the law (Section 1387, Penal Code) forbids, not only the disclosure of the fact that an information has been filed, but even the fact that leave to file has been granted by the court, until after arrest, and also contemplates that, if the defendant is at large, the minutes of the court shall be silent as to the order of the court theretofore made granting leave to file the information. Section 1820 of the Code of Civil Procedure, providing that "every direction of a court or judge made or entered in writing, and not included in a judgment is denominated an order," does not apply to an order granting leave to file an information, or render indispensable the making and entering of such an order in writing before the defendant is arrested.

The record before us discloses that defendant was informed against on April 20, and duly arraigned on April 22, 1896. On April 23d the court ordered the minutes of April 20th

corrected so as to show the application for leave to file the information, and the order that leave be granted to file the same. This correction was evidently made to have the record speak the truth, and was but the constitutional exercise of the court's inherent power to supply an omission of the clerk. (*Territory* v. *Clayton*, 8 Mont. 1, 19 Pac. 293.)

3. The defendant challenged the regular panel of the trial jury, on the ground that the officials who made up the jury lists did not enter upon such lists the names of all persons whom they believed qualified to act as trial jurors in the county of Flathead, and who were in fact qualified in law to serve as trial jurors. In support of this challenge the record shows that the defendant "offered to prove by the testimony of at least two of the jury commission that the facts and statements set forth in the challenge as the grounds therefor are true." No further action was taken by defendant, and the court overruled the challenge. This ruling of the court is assigned as error. Section 241 of the Code of Civil Procedure requires the officials whose duty it is to make up the lists of persons to serve as trial jurors to select from the last assessment roll of the county, and make a list of, all persons whom they believe to be competent and qualified to serve as trial jurors, as prescribed in Section 230 *et seq.* of the Code of Civil Procedure. If, therefore, it was a fact that the officers had purposely omitted the names of persons whom they believed to be competent and qualified to serve as trial jurors, the challenge would have been well interposed. But the defendant did not offer to support the challenge by calling a witness, or by filing any affidavits, to sustain the averments of his challenge. It is not an offer to prove to simply state an "offer to prove" by the testimony of a witness that certain facts and statements upon which a party bases a challenge to the panel of a jury are true, without having the witness present and calling him, or asking leave to call him, or without affirmatively showing that the offer is made in good faith, and with the means of doing or trying to do what is desired. (Thompson on Trials, § 685.) The presumption is that the jury lists

were made up according to law, and that the officials who selected the persons on the lists did their duty; and this presumption must prevail until an offer of proof is actually made in good faith, by introducing witnesses or other proof, or actually tendering such proof to the court. It follows that no error was committed in overruling defendant's challenge.

4. The county attorney asked the prosecutrix to state the relationship between herself and defendant, if any there was. This question was objected to, but allowed, and she replied that the defendant was her father. The objection to the question is stated to be that the relationship between the witness and defendant is immaterial, but that the purpose of proving the fact was to prejudice the jury.

No less eminent a jurist than Cooley had occasion to pass upon a like argument in a prosecution for rape, and thus answered it: "The reason assigned for the objection to this question is that the relationship is an immaterial fact, but that the tendency of the proof of it must be to excite a prejudice against a defendant, whom the nature of the charge always places sufficiently at a disadvantage, and whom it should be the aim of the law to guard against any circumstances which by possibility might prevent a calm and dispassionate investigation of the charge by the jury. We think, however, that the danger of creating prejudice by such evidence is not sufficiently imminent to excite alarm. The relationship may be a fact of importance in the case, as bearing upon the reasonableness of the woman's story, and upon the probability of the resistance having been all that was to have been expected if her complaint is well founded. We have no doubt it was a proper circumstance for the prosecution to prove." (*Strang* v. *People*, 24 Mich. 1.)

5. The prosecutrix was permitted to testify as to her own age. This testimony was objected to, but the objection was overruled. Recent authorities hold that the age of a prosecuting witness alleged to be under the age of consent may be proved by her own testimony. (Underhill on Criminal Evidence, § 342; Wharton's Criminal Evidence, § 236; *People*

v. *Ratz*, 115 Cal. 132, 46 Pac. 915; *Bain* v. *State*, 61 Ala. 75.)

The fact that the witness derived her knowledge of her age from statements of her parents, of family reputation, does not make it inadmissible. Persons of the age of discretion, and many who are of even tender years, know enough of themselves to state their ages with intelligence and accuracy. Such testimony is often essential to prove age, and for this reason it is competent; being excepted from the rules generally excluding hearsay evidence.

In the appellant's brief his counsel make a point upon the ruling of the court denying their request to interrogate the prosecutrix concerning her knowledge of the fact of her age. But, although the leave to examine the witness was denied while she was testifying in response to questions put to her by the county attorney, it appears that upon cross-examination defendant's counsel had full opportunity to test her knowledge of her age, and did test it, and thereafter moved to strike out all of the testimony of the witness concerning her age, because it was hearsay. The ruling of the court was correct, and no prejudice was done to appellant's rights.

6. The next specification relied on is the overruling of defendant's motion to direct a verdict of acquittal. This assignment is predicated upon the statement that "the evidence fails to show that the defendant used force in accomplishing his purposes." But if the jury found that the defendant had sexual intercourse with the prosecutrix, and that she was under the age of 16 years, the question of force became wholly immaterial. (Section 450, Penal Code.) Whether or not she was under the age of 16 was a question to be determined by the jury, and was fairly submitted to them. There is, however, in the record, testimony by the prosecutrix tending to show that she resisted the efforts of the defendant, and tried to jerk away from him, but that the defendant told her he would kill her if she attempted to get away, and that she was afraid he would carry out his threat, and that he penetrated her person with his. She also said that she never consented, but yielded

because of the threats and force used by the defendant, and not otherwise. Under no circumstances, therefore, is the defendant in a position to complain of the ruling of the court in denying his motion to direct a verdict of acquittal for lack of proof.

7. Error is assigned because of the refusal of the court to give to the jury certain instructions, numbered 1, 3 and 5. Instruction No. 1 was prefaced by informing the jury of the serious nature of the crime, and that the charge is "well calculated to create a strong prejudice against the accused," etc. It then told the jury that, in order to convict, they should find on the part of the woman not merely a passive policy or equivocal submission to the defendant, and that voluntary submission, with the power to resist, removes from the act an essential element of the crime of rape, and if they found that the prosecutrix resisted for a time, and then finally consented, or remained passive, and that she has not been proven, beyond a reasonable doubt, to be under the age of 16, they should acquit the defendant. While this instruction contained much that is the law generally, we see no error in the refusal of the court to give it, inasmuch as the substance of it was included in instructions given.

Instruction No. 3 told the jury that it was necessary for the state to prove that the prosecutrix was under the age of 16 years, or that the defendant had carnal knowledge of the prosecutrix forcibly and against her will. The substance of this instruction was also embraced in the instructions given.

Instruction No. 5 told the jury that in rape a penetration is necessary to complete the crime. This element of the crime was also fairly covered by instructions that were given.

Indeed, after carefully examining the whole charge, we express our approval of it. It was an unusually clear and fair presentation of the law applicable to the crime of rape.

It appearing by the record that the defendant had a fair trial, and that there are no errors in the record, we must affirm the judgment and order appealed from.

Affirmed.

PEMBERTON, C. J. and PIGOTT, J., concur.

STATE OF MONTANA, RESPONDENT, v. FRANK RODGERS, APPELLANT.

[Submitted May 9, 1898. Decided May 16, 1898.]

Robbery—Instructions—Proof of Species of Money or Notes.

1. ROBBERY—*Instructions*.—The defendant was tried for the crime of robbery, the information charging that the crime was committed by force; the court, having properly defined the crime, further charged the jury that it was incumbent upon the prosecution to prove that the property was taken by force. *Held*, that the omission of the word "feloniously" from this charge was not error, as the court had already fully instructed the jury upon that branch of the case.
2. PROOF OF SPECIES OF MONEY OR NOTES.—Section 2109 of the Penal Code provides that upon a trial for larceny of money, notes, certificates of stock, etc., the allegation of the information, so far as regards the description of the property, is sustained, if the offender be proved to have embezzled or stolen any money, bank notes, etc. *Held*, that larceny is included in the crime of robbery, and that in a prosecution for robbery it was not error to instruct the jury in accordance with the above law concerning the proof of the property alleged to have been taken.

Frank Rodgers was convicted of robbery, and he appeals from the judgment, and from an order refusing a new trial. Affirmed.

J. M. Clements and *Harry Harris*, for Appellant.

C. B. Nolan, for the State.

PEMBERTON, C. J. The defendant was convicted of the crime of robbery in the district court in Lewis and Clarke county, and appeals from the judgment of conviction, and an order refusing him a new trial.

Counsel for appellant contends that the following instruction given by the court is erroneous: "You will observe, however, that fear is not charged in this information, that the defendant is accused of taking money by force, and it is incumbent upon the state to prove to you beyond a reasonable doubt that the money was taken; that it was taken from the person or immediate presence of Joseph Sullivan against his will, by the defendant, accompanied by means of force."

His position is that this instruction defines the crime of

robbery, and that it assumes that a felonious intent is not an essential of the crime, when the robbery is committed by means of force, as distinguished from a case wherein the crime is committed by putting the victim in fear. We cannot agree with this argument. This instruction does not attempt to define robbery. The court had properly done this in a previous instruction. This instruction merely tells the jury that the ingredient of fear is not charged in the information, and that it is therefore incumbent on the state to prove beyond a reasonable doubt that the crime was committed by means of force. This was simply telling the jury that they need not inquire whether the defendant's victim was put in fear, but to inquire only as to whether he committed the crime, if at all, by means of force. We fail to see any error in this instruction.

This case is very different from the case of *State* v. *Oliver*, 20 Mont. 318, 50 Pac. 1018, cited as authority by counsel in his brief. In *State* v. *Oliver* the court, in defining robbery, omitted entirely from the instruction the word "feloniously." This court held the instruction fatally bad for that reason. But in the case at bar there is no such omission.

Counsel for appellant assigns as error the giving of instruction No. 7 by the court. This instruction reads as follows: "In this case the allegation of the information, so far as regards the description of the property alleged to have been taken from Joseph Sullivan by the defendant, is sustained if you are satisfied beyond a reasonable doubt that the defendant feloniously took any money, bank notes, or pieces of coin in the possession of Joseph Sullivan from Joseph Sullivan's person or immediate presence, and against his will, accompanied by means of force, and that the property so taken had some value."

This instruction is based upon Section 2109 of the Penal Code, which is in part as follows: "Upon a trial for larceny of money, bank notes, certificates of stock, or valuable securities, the allegation of the indictment or information, so far as regards the description of the property, is sustained, if the

offender be proved to have embezzled or stolen any money, bank notes, certificates of stock, or valuable securities, although the particular species of coin or other money, or the number, denomination, or kind of bank notes, certificate of stock or valuable security be not proved."

As this section refers to larceny, and not robbery, the question first to be considered in treating this instruction is as to whether larceny is necessarily included in the crime of robbery. We think it is.

In discussing this question the Supreme Court of California, in *People* v. *Crowley*, 100 Cal. 478, 35 Pac. 84, say: "But larceny and robbery are generically the same—the one being merely an aggravated form of the other. Each is the felonious taking of the personal property of another, although in robbery the felonious taking is accomplished by force or threats. The text books speak of robbery as 'an aggravated species of larceny.' (2 Russell on Crimes, 101.) In East's Pleas of the Crown, the author, after speaking of certain larcenies from the person, says: 'The next species of aggravated larceny from the person is robbery.' And indeed the distinction between certain larcenies from the person, and robbery, is often hard to draw. It has been held here that robbery necessarily includes larceny, and that under an indictment for the former there may be a conviction of the latter. (*People* v. *Jones*, 53 Cal. 58; *People* v. *Gilbert*, 60 Cal. 111.) In *People* v. *Jones*, 53 Cal. 58, the court says that 'an indictment for robbery must aver every fact necessary to constitute larceny and more.' This being so, if the appellant had the intent to commit robbery, that intent included all the elements of an attempt to commit larceny. The information in the case at bar therefore sufficiently complies with the reason of the rule that a defendant must be informed of the charge against him." (See, also, McClain on Criminal Law, Sec. 574.)

If in larceny, then, the description of the stolen property is sustained if the offender is proved to have stolen any money, although the stealing of the particular money charged be not

proved, the same rule must be held applicable to the description of money taken in the commission of the crime of robbery. It is necessary, both in larceny and robbery, to prove a felonious taking of the money or property which is the subject of the larceny or robbery charged. It would require the same evidence to prove the larceny or felonious taking in either case. If robbery be charged, it is necessary that the evidence go further, and establish that the taking was accomplished by means of force or fear. We are of the opinion that there was no error in giving this instruction.

There are other errors assigned by counsel for appellant, but we think they are so dependent upon the assignments treated above as to render particular discussion of them unnecessary.

In this case the court properly defined the offense charged in the information, and clearly told the jury that they must find beyond a reasonable doubt that the defendant feloniously committed that crime before they could convict. We are unable to see that the instructions, taken as a whole, did or could mislead the jury.

The judgment and order appealed from are affirmed.

Affirmed.

HUNT and PIGOTT, JJ., concur.

CITY OF PHILIPSBURG, RESPONDENT, v. HERMAN WEINSTEIN, APPELLANT.

[Submitted May 12, 1898. Decided May 23, 1898.]

Criminal Law — Pawnbroker — License — Pleading — Ordinance—Review on Appeal.

1. PAWNBROKER—*License.*—In a criminal action for carrying on the business of a pawnbroker, which is a misdemeanor under the Statute, the evidence tended to show that defendant frequently loaned money to persons upon the pledge of personal property as security, and that they had a right to redeem the property so pledged by paying the sum borrowed with interest; the defendant claimed that he bought the

property referred to and sold the same back to the owners. *Held*, that the finding of the court that the defendant was guilty would not be disturbed.

2. SAME—*Pleading—Ordinance.*—Under Section 2680 of the Penal Code, in a criminal proceeding for the violation of a city ordinance, it is sufficient to plead the ordinance by title, section and subdivision.

3. APPEAL.—*Review.*—The Supreme Court will not review an error of law not raised in the District Court.

Appeal from District Court, Granite County; Theodore Brantly, Judge.

Herman Weinstein was convicted of violating an ordinance of the city of Philipsburg in carrying on a pawnbroking business without a license. From the judgment and an order overruling his motion for a new trial, he appeals. Affirmed.

W. E. Moore, for Appellant.

Durfee & Brown, for Respondent.

PER CURIAM. The defendant appeals from a judgment of the district court finding him guilty of a misdemeanor, and fining him five dollars, for having carried on and conducted the business of a pawnbroker without having first procured a license, as required by the ordinances of the city of Philipsburg, Montana. He also appeals from an order overruling his motion for a new trial.

1. This court cannot say that the evidence is insufficient to justify the finding of the court that the defendant was guilty of pawnbroking. There is substantial evidence on the part of the city tending to prove that defendant frequently loaned money to persons who pledged him their personal effects and property, such as watches, revolvers, etc., as security for loans made, and who were accorded the right of redeeming effects so pledged by repayment of the sum borrowed, with heavy rates of interest added. The defendant himself admitted such transactions, but said that he bought the effects left in his possession, and that he sold them back in a short time for advanced figures. But the court found that the business was pawnbroking, not bargain and sale, and we cannot hold that the finding was unsupported by the evidence.

2. It is argued that the complaint is insufficient, for the reason that the ordinance alleged to have been violated is not properly pleaded, not being set forth in the complaint. The ordinance was pleaded by reference to its title, section, and subdivision of section, and chapter of the revised and codified ordinances, of the city of Philipsburg. No more is required. (Section 2680, Penal Code; *City of Bozeman* v. *Cadwell*, 14 Mont. 480, 36 Pac. 1042.)

3. The next point made by appellant is that the ordinance alleged to have been violated was not read or introduced in evidence upon the trial. No such error is specified in the assignments of error. The question, therefore, not having been before the district court for review, is not before this court on appeal. (*Tuttle* v. *Merchants' National Bank*, 19 Mont. 11, 47 Pac. 203.) Besides, the case was evidently tried by all parties upon the theory that the ordinance referred to in the complaint was admitted in evidence by the court.

The judgment and order appealed from are affirmed.

Affirmed.

STATE EX REL. W. E. DONOVAN, RELATOR, v. ROBERT B. SMITH ET AL., RESPONDENTS.

[Submitted May 4, 1898. Decided May 23, 1898.]

The second section of the Act of 1897 (pp. 166-171) relating to the erection of the State Capitol Building, authorized the State Board to procure plans and specifications for the building, but did not limit the Board to plans, etc., prepared by citizens of the state. Section 8 of the Act, after providing that the Board should contract with the architect for compensation, contains the following: "That all architects, superintendents and contractors shall be citizens of the State of Montana." The law also authorizes the Board to "avail itself of the plans and specifications heretofore adopted for a State Capitol Building" if the same can be used, etc.

***Held*, That a petition which held that the Board had awarded the contract for furnishing plans and specifications to certain architects who were not residents of Montana, and had also entered into a contract with them to superintend the construction of the building, and were about to carry out these contracts, states facts sufficient to entitle the petitioner to a writ of prohibition. *Held*, further, that if the plans contracted for were modifications of the plans heretofore adopted for the State Capitol Building, or if the persons to whom the contract was awarded are citizens of the state these matters should be set up in an answer.**

APPLICATION by the state, on relation of W. E. Donovan, for a writ of prohibition against the Board of State Capitol Commission. Motion to dismiss application overruled.

Campbell & Parr, for Relator.

C. B. Nolan, *Attorney General*, for Respondents.

PER CURIAM. This is an application for a writ of prohibition. The relator, who is an architect, makes this application for himself and other architects of the state. The respondents constitute the Board of State Capitol Commission.

It appears from the affidavit of the relator that the respondent board, after duly advertising for bids therefor, as required by law, on the 19th day of March last awarded the contract for furnishing the plans, specifications and detailed drawings for the capitol building to be erected at the city of Helena to C. E. Bell and J. H. Kent, who are alleged to be co-partners, doing business under the style and firm name of Bell & Kent, at Council Bluffs, in the state of Iowa, and also at that time entered into a contract with said Bell & Kent to superintend the construction of said building as superintending architects during the erection of the building, for certain sums set forth in the application. The affidavit also states that said Bell and Kent, or either of them, were not citizens at the time of the awarding of the contract to them, and that, at the commencement of this proceeding, they were not citizens of the state of Montana, but were and are citizens and residents of the state of Iowa. The relator contends that, said Bell and Kent not being citizens of the state of Montana at the execution of said contract, nor at the present time, the said board exceeded its jurisdiction by entering into said contract, and now threatens to continue to exceed its jurisdiction by carrying out the terms of said contract made with said Bell & Kent, as aforesaid, unless prohibited from so doing. The relator asks, therefore, that this court issue its writ of prohibition restraining and prohibiting the said board from carrying out said contract with Bell & Kent.

The respondent board appeared by counsel, and filed its motion in the nature of a demurrer to the application, on the ground that the same does not state facts sufficient to entitle the relator to the relief sought.

The contention of the relator is that, under the law, the board has no authority or power to enter into the contracts mentioned in the affidavit with any architect not a citizen of this state. The determination of this question involves a construction of the law passed by the legislative assembly at its last session. (See Session Acts 1897, pp. 166–171.) This act amended the former legislation of the state providing for the erection of a state capitol building. The attorney general contends that Section 2 of the Act of 1897 does not limit or confine the board in procuring plans and specifications for the capitol building to plans and specifications prepared by architects who are citizens of the state. It is true that this section does not in express terms require the board to contract with architects who are citizens of the state for such plans and specifications. But Section 3 of the same act, after providing that the board shall contract with the architect chosen for compensation, and prescribing the duties of the architect, fixing his bond, etc., has this proviso: "That all architects, superintendents and contractors shall be citizens of the state of Montana." It is true that the board is authorized by the law of 1897 to "avail itself of the plans and specifications heretofore adopted for a state capitol building" if the same can be modified and used in the construction of the new and different building to be erected by the board under the amended law. But it does not appear by the application in this case that any modified plans and specifications heretofore adopted for a capitol building are being now used by the board, or that the board contemplates using such plans and specifications in erecting the building. It is alleged that the board has contracted for plans and specifications furnished by architects not citizens of the state, and has also contracted with such architects to superintend the construction of the building. We are not prepared, therefore, to hold that the affidavit for the writ does

not state facts sufficient to entitle the relator to relief. If the plans and specifications contracted for are the modified plans and specifications heretofore adopted for a state capitol building, this fact should be pleaded by answer. If the persons to whom the contracts mentioned in the affidavit were or are citizens, or if either of them was or is a citizen, of the state, such fact should be set out in an answer. These matters cannot be determined upon the hearing of the motion under discussion.

The motion is overruled.

STATE OF MONTANA, RESPONDENT, v. HARRY GILL, ET'AL., APPELLANTS.

21	151
24	344
21	151
30	522
21	151
f36	119

[Submitted May 18, 1898. Decided May 23, 1898.]

Criminal Law—Robbery—Information—Instruction—Record on Appeal.

1. ROBBERY.—*Information.*—An injunction for robbery charged as follows (omitting unimportant matters): That the defendants on the 18th day of November, A. D. eighteen hundred and ninety-seven, with force and arms in and upon one "C. H.,' then and there being, feloniously did make an assault, and the said "C. H." in bodily fear and danger of his life then and there feloniously did put, and (describing the property) of the goods and chattels of said "C. H."—then and there in the possession of the said "C. H.," from the immediate presence of the said "C. H." and against the will of the said "C. H.," by means of the fear aforesaid, did feloniously steal, take and carry away, with the intent then and there to deprive the said "C. H." thereof, etc. *Held*, first, that the information states the time when the property was taken. Second, that the intent to deprive the owner of the property was sufficiently alleged, Third, that the information sufficiently charged the fear necessary to constitute the crime of robbery as defined in Section 391 of the Penal Code.
2. INSTRUCTION.—Where the record on appeal does not contain any evidence, the court will not consider any assignment of error in the giving or refusing instructions.

Appeal from District Court, Madison County; M. H. Parker, Judge.

Harry Gill and four others were convicted of robbery, and they appeal. Affirmed.

W. A. Clark, for Appellants.

C. B. Nolan, Attorney General, for the State.

PEMBERTON, C. J. The appellants were tried and convicted in the district court of Madison county of the crime of robbery, and from the judgment of conviction this appeal is prosecuted.

Counsel for the appellants contends that the information is fatally defective, in that it does not state facts sufficient to constitute a public offense.

The information charges that the crime of robbery was committed by the appellants as follows: "That the said Harry Gill, George Ogilvie, James Layhay, William Benoit, and Charles Truby, on the 13th day of November, A. D. eighteen hundred and ninety-seven, at the county of Madison, state of Montana, with force and arms, in and upon one Charles L. Hathaway, then and there being, feloniously did make an assault, and the said Charles L. Hathaway in bodily fear and danger of his life then and there feloniously did put, and ten pounds of gold amalgam, a more particular description whereof is to the said county attorney unknown, of the value of seven hundred and fifty dollars, and one revolver, known as a 'Colt's Frontier Six-Shooter,' a more particular description whereof is to the said county attorney unknown, of the value of twelve dollars, of the goods and chattels of said Charles L. Hathaway, the true owner thereof, then and there in the possession of the said Charles L. Hathaway, from the immediate presence of the said Charles L. Hathaway, and against the will of the said Charles L. Hathaway, by means of the fear aforesaid, did feloniously steal, take, and carry away, with the intent then and there to deprive the said Charles L. Hathaway thereof," etc.

Counsel contends that there is no allegation in the information as to when the property was taken from the owner. But we think this contention is not supported. The information alleges the assault to have been made on the 13th day of November, 1897, and, after describing the property as then and there in possession of Hathaway, charges that the appellants did feloniously steal, take, and carry away said property, "with the intent then and there to deprive" Hathaway

thereof. This language admits of no uncertain construction as to when it is charged appellants took the property from the possession of the owner.

Counsel makes the contention that there is no allegation in the information of any intent to deprive the owner of any property. The information charges the property to have been stolen "with the intent then and there to deprive the said Charles L. Hathaway thereof." It is apparent that the word "thereof" refers to the property described. The language of the information admits of no other reasonable construction.

It is claimed by appellants' counsel that the information does not contain any sufficient allegation of fear so as to constitute robbery under our statute. The language of the information charging fear is, "And the said Charles L. Hathaway in bodily fear and danger of his life then and there feloniously did put." Counsel contends that this is not the equivalent of the "fear of an unlawful injury to person or to property" mentioned in our statute as a necessary element of robbery. (Sec. 391, Penal Code.) But it is difficult to understand how a person can be feloniously put in bodily fear and danger of his life without being in fear of an unlawful injury to his person. The information charges more than the statute requires, and, if that be the only fault or criticism, the information is good. (Bishop on Criminal Procedure, Vol. I, Sec. 613.)

We think the information sufficient when tested by the rules prescribed by our Code. (Sections 1841, 1842, Penal Code; *State* v. *Bloor*, 21 Mont. 49, 52 Pac. 611.)

The court gave the following instruction to the jury: "The jury are instructed that although the jury may believe, from the evidence, that Hathaway was indebted to the defendants in different sums of money, that fact would not justify the defendants in taking from said Hathaway the personal property mentioned and described in the information, or any part thereof, by force and violence, or in any other way except by the voluntary consent of said Hathaway, or by due

process of law, and that such taking by force and violence or against the voluntary consent of the said Hathaway was unlawful,"—and refused to give the following one, at the request of appellants: "If the jury believe from the evidence in this case that the defendants went to the house where said Hathaway was sleeping with intent and purpose of securing from said Hathaway the money that was due them for their wages, or compelling the said Hathaway to pay them their wages, or deliver up to them the amalgam in his possession in payment or part payment of said wages, and that the said Hathaway got said amalgam, and handed it over or put it in a position where the said defendants, or either of them, could take possession of it, then, in law, said defendants were not guilty of robbery, and you must acquit."

This action of the court is assigned as error. Whether such action of the court was erroneous or not depends necessarily upon what the evidence was. It is impossible for us to determine whether or not the court erred in this particular without an examination of the evidence, and there is not a syllable of evidence in the record. The attorney general practically concedes in his argument that, if the evidence was before the court, it would show that the district court erred in giving and refusing the instructions complained of, but says, also, if the facts constituting the alleged crime be as indicated in the instruction refused by the court, and that such facts do not in law constitute robbery, then, under the condition of the record in this case, the proper appeal of the appellants is to the executive of the state. We are fully in accord with the attorney general in this respect. At any rate, the record is in such condition that we are unable to consider the error assigned in the giving and refusing of the instructions in question.

The judgment is affirmed.

Affirmed.

HUNT and PIGOTT, JJ., concur

STATE OF MONTANA EX REL., ALEX. J. JOHNSTON, RELATOR, v. DISTRICT COURT, RESPONDENT. 21 155 38 171

[Submitted May 4, 1898. Decided May 23, 1898.]

Receiver—Appointment of—Collateral Attack—Contempt.

1. **RECEIVER**—*Appointment of—Collateral Attack.*—An order appointing a receiver may be attacked collaterally, where it appears upon the face of the proceeding that the court did not have jurisdiction to grant the order.
2. **SAME**—*Contempt.*—Where a court has made an order appointing a receiver, without jurisdiction so to do, a stranger to the proceeding cannot be punished for a contempt of court, for interfering with such order.

PETITION by Alex. J. Johnston for *certiorari* to the District Court of the Second Judicial District. Writ issued.

Statement of the case by the justice delivering the opinion.

The relator sets forth substantially the following facts in his petition for a writ: An action was commenced in the district court of Silver Bow county by J. D. Thomas and George P. Bretherton against the Thornton-Thomas Mercantile Company, a corporation, asking for the appointment of a receiver to take charge of all the property of said corporation, collect its rents, etc., and to sell the property of the corporation, and to practically wind up its business. The district court appointed one E. H. Hubbard as receiver, and such receiver duly entered upon his duties, and took charge of the effects of the corporation. Thereafter the court directed the receiver to sell and dispose of the stock of merchandise which then belonged to the corporation, and in pursuance of such order the receiver sold the stock to the firm of Lutey Bros., who paid to the receiver therefor the sum of $3,241.19. The receiver deposited said sum of money to his credit as receiver in the bank of W. A. Clark & Bro., at Butte. Thereafter the said Thornton-Thomas Mercantile Company applied to the supreme court of the state for a writ of *certiorari* to annul the action of the district court in the appointment of a receiver of said cor-

poration, upon the ground that such appointment was unauthorized and void, for the reason that the court had no jurisdiction to make the same. This court decided that the action of the district court was null and void, that there was nothing before the court to authorize the appointment of a receiver, and that the order appointing a receiver and all orders of the court made subsequent thereto should be vacated. (*State* v. *Clancy*, 20 Mont. 284, 50 Pac. 852.)

After the decision of this court the creditors of the corporation attached the stock of merchandise that had been purchased by Lutey Bros. for debts due by the Thornton-Thomas Mercantile Company. The sheriff took possession of the property from Lutey Bros. by virtue of the writs of attachment, and afterwards sold the same to satisfy the judgments against the corporation. Lutey Bros. then petitioned the district court of Silver Bow county for an order directing the receiver of the corporation to repay to them the sum of $3,241.19, said sum being the amount they had paid to the receiver for the stock of merchandise. The receiver moved to dismiss the petition of Lutey Bros., but the court overruled this motion. Thereupon the receiver and Lutey Bros. agreed that the sum of $2,825.39 was the amount remaining due from the receiver to Lutey Bros., and the court then directed the receiver to pay this latter amount to Lutey Bros. out of any moneys in his hands which he had received from Lutey Bros. for the stock of merchandise. The receiver then presented to the bank of W. A. Clark & Bro. a check payable to the order of himself, signed by E. H. Hubbard, receiver, for the sum of $2,825.39, in order to obtain the money to comply with the order of the court directing him to pay said amount to Lutey Bros. The receiver exhibited to A. J. Johnston, the cashier of said banking house of W. A. Clark & Bro., a copy of the order of the court directing him, as receiver, to pay the said sum of money to Lutey Bros., but the said Johnston, the relator in this case, refused payment of the check presented by the receiver. Thereupon Hubbard, as receiver, filed a petition alleging the facts as heretofore set forth, and showing that he had to his

credit as receiver more than enough money to pay the check, and that the said Johnston knew that the said money was deposited in the bank of W. A. Clark & Bro. to the credit of E. H. Hubbard, as receiver. The court then directed said Johnston to show cause why he should not pay the check of the receiver, or be punished for contempt for interfering with the receiver in the discharge of his duties. Johnston, the cashier of the bank, for an answer to the order, admitted the truth of the material facts alleged in the petition, but averred that the court had no jurisdiction over him or the said money, and that the money deposited in the bank of Clark & Bro. had been attached by W. A. Clark & Bro., the banking firm where the said fund was deposited, and that in the said action the said Hubbard and he, the said Johnston, had been served with notices of garnishment. Johnston further alleged upon information and belief that while Lutey Bros. had possession of the stock of merchandise which they had bought from the said Hubbard as receiver, they had sold about $1,500 worth of the goods, and that the sale by Hubbard, as receiver, to Lutey Bros. had not been revoked by the corporation, and that the said $1,500 ought to have been deducted from the total of $3,241.19, and that the said Hubbard and Lutey Bros. were in collusion to deprive W. A. Clark & Bro. of their just right to the money on deposit in the said banking house. The district court ruled that the reply of Johnston did not exonerate him from paying the check of Hubbard, as receiver, and accordingly ordered that said Johnston pay to said Hubbard, as receiver, the sum of $2,825.39, upon the receiver presenting to the said banking house of W. A. Clark & Bro. a check properly drawn upon the fund on deposit, as heretofore referred to, within fifteen days from the date of the order of the court, or that he be imprisoned in the county jail until he comply with the order. The respondent contends that upon the record the court is not warranted in issuing the writ prayed for.

John B. Welcome and *Corbett, Clayberg & Gunn*, for Relator.

Campbell & Parr, for Respondents.

HUNT, J. We think the learned counsel for the respondents has assumed a false premise in his brief, and upon it has constructed his argument. His error lies in the very statement of the question for consideration, which he puts as follows: "Is the person with whom a receiver of a court deposits money or property subject to the order of the court?" No doubt that, if the case were one where the cashier of a depository of a receiver's funds had refused to obey the order of a court of competent jurisdiction to pay into the receiver's hands money belonging to him as receiver, and held by the depository as a credit to the receiver's account, the officer of such depository so refusing would be liable in a contempt proceeding, upon the familiar doctrine that an unauthorized interference with a receiver's possession constitutes a contempt of court. (High on Receivers, Sec. 164.) Nor will it be denied that the liability of one who interferes with the rights of a receiver or his business by any unauthorized refusal to turn over property or funds to which the receiver is entitled, and for the delivery over of which the receiver has given orders, would make the one so refusing guilty of a contempt of court. So far, therefore, as these general principles of equity jurisdiction which are relied upon by respondent are applicable, we do not dissent from them. We likewise agree to the proposition that, where one refuses to pay money held by him as a credit to the receiver's account, upon an order by the receiver made pursuant to an order of court, the party so refusing to pay in a contempt proceeding cannot justify his refusal upon the ground that the appointment of the receiver was improperly made, or even erroneous, for the court will not consider those matters in a collateral proceeding. The writ of *certiorari* being one of review limited to the determination of whether the inferior court has exceeded its jurisdiction, and regularly pursued its authority, the action of the district court after it assumed jurisdiction and took control through a receiver, however erroneous that action may have been, unless

it was void, could not be disobeyed, and the disobedience justified by answering that the court's order was erroneously or improvidently made. (Smith on Receiverships, p. 85.)

But here the error of the court in adjudging petitioner guilty upon the facts alleged was one that involved an excess of the court's jurisdiction. This is apparent, under the decision of this court in *State* v. *Clancy*, 20 Mont. 284, 50 Pac. 852, where it was decided that the original complaint filed in the district court of Silver Bow county in the case of J. D. Thomas et al. against Thornton-Thomas Mercantile Company was "virtually a blank paper," and that for various reasons, stated in the opinion, there was no authority of law to appoint a receiver of the corporation at all upon the showing made. The case, therefore, is not one where there has been a receiver appointed by a competent court with jurisdiction over the subject-matter and of the parties before it, and where the court's orders were regular, even though erroneous, but one where the court has done that which is a nullity, and where all the orders, including the one appointing a receiver, and all those subsequent thereto, are absolutely void, and entirely beyond the jurisdiction of the court that made them. (*People* v. *Weigley*, 155 Ill. 491, 40 N. E. 300.) Such being the state of the case, the order of the district court appointing the receiver can be assailed collaterally, and with impunity by anybody. (Van Fleet's Collateral Attack, Sec. 16.)

The real question for decision, then, is whether the district court in which the receiver was appointed, and in which the court ordered that the receiver pay Lutey Bros. the sum of money named in the order, had jurisdiction to grant the ultimate relief prayed for in the complaint in the original action. And as that question has been answered by this court in the negative, it follows that the court had no power in the proceedings in that action to authorize the receiver to pay over any moneys to his credit in the bank of Clark & Bro. to Lutey Bros. after the same were attached in the hands of the bank. If, after our decision, the Thornton-Thomas Mercan-

tile Company had gone into court, and made an application to have its property which had been taken away and sold by the receiver restored to it by him, and the court had made an order to that effect and the receiver had disobeyed the order, it may be that such disobedience would have constituted a contempt, as was held in *People* v. *Jones*, 33 Mich. 303; or perhaps the money collected by the receiver, who acted under an appointment that was void, could be recovered by the party entitled to it in an action in *assumpsit*, as in *Johnson* v. *Powers*, 21 Neb. 292, 32 N. W. 62. See, also, *O'Mahoney* v. *Belmont*, 62 N. Y. 133. But where a stranger to all parties to the original suit of Thomas et al. against the Thornton-Thomas Mercantile Company has disobeyed an order of court which the court had no authority in law to make, he cannot be guilty of contempt. (*State ex rel. Evans* v. *Winder* (Wash.) 44 Pac. 125; *Clark* v. *Burke*, 163 Ill. 334, 45 N. E. 235; *People* v. *Weigley*, 155 Ill. 491, 40 N. E. 300.) "A party cannot be guilty of contempt of court for disobeying an order which the court had no authority of law to make." (*Leopold* v. *People*, 140 Ill. 553, 30 N. E. 348; *Brown* v. *Moore*, 61 Cal. 432; *People* v. *O'Neil*, 47 Cal. 109; *Whitney* v. *Hanover National Bank* (Miss.) 15 South. 33.)

We are of the opinion that the writ prayed for must issue, and it is so ordered.

PEMBERTON, C. J. and PIGOTT, J., concur.

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JOHN EAKINS ET AL., APPELLANTS, v. JAMES W. KEMPER, RESPONDENT.

[Submitted May 20, 1898. Decided May 30, 1898.]

Judgment—By Default—Vacating.

In an action of forcible entry and unlawful detainer, a judgment by default was taken and defendant moved to set aside the same. It appeared upon the motion that the action was commenced in the district court and that the defendant retained attorneys to represent him and gave them the summons and complaint served upon him and also told them the date of service; it further appeared that the summons in such

case is made returnable not less than four nor more than twelve days after the date of the summons; that the attorneys for defendant read the prayer of the complaint which was served with the summons, and from that concluded that the action was one of ejectment in which class of actions defendant would have 20 days within which to answer: *Held*, that an order setting aside the judgment by default was not an abuse of discretion, and would not be disturbed.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

ACTION by John Eakins and the Butte Sewer-Pipe & Tile Company against James W. Kemper. From an order setting aside a judgment by default, plaintiffs appeal. Affirmed.

Statement of the case by the justice delivering the opinion.

This was an action by the plaintiffs to recover the possession of certain premises and mining claims, and for damages for the detention of the possession of such property and premises from the plaintiffs. The suit was instituted under the statutory authority providing summary proceedings for obtaining possession of real property, and defining what constitutes guilt of forcible entry and of forcible detainer. (Section 2080 *et seq.* Code of Civil Procedure).

The plaintiffs' complaint was filed April 19, 1897. Summons was issued on that day, requiring defendant to answer on or before April 26, 1897, or to submit to judgment by default. The summons was duly served on April 19th.

On April 27, 1897, the default of the defendant was entered, said defendant having made no appearance whatsoever Judgment was entered on the same day in favor of plaintiffs, and against the defendant; and it was ordered that the plaintiffs recover from the defendant the possession of the certain premises described in the complaint, and that the plaintiffs be restored to the possession of said premises and mining claims. It was also further ordered that the plaintiffs' damages be trebled, and judgment in their favor was rendered in the sum of $975. with interest and costs.

On April 28, 1897, execution was issued upon the judgment referred to, and the plaintiffs were restored to the possession of the premises described in the complaint.

On May 3, 1897, the defendant moved to vacate and set aside the judgment, on the ground that it had been entered against him through his mistake, inadvertence, surprise, and excusable neglect, and for the reason that he had a just and meritorious defense to the action. The answer submitted with the motion to set aside the default, contained denials of the averments in the complaint, which denials, if true, constituted a sufficient defense. The affidavits filed in support of the motion contained facts as set forth in the opinion of this court.

The district court, on May 6, 1897, set aside the judgment theretofore rendered, and made an order restoring defendant to the possession of the premises from which he had been dispossessed by virtue of the judgment of the court.

Plaintiffs excepted to the action of the court, and appeal from the order setting aside and vacating the default, and setting aside and vacating the judgment entered therein, and from the judgment.

J. O. Bender, for Appellants.

(Citing: *Thomas* v. *Chambers*, 14 Mont. 423; *Hagen* v. *Lorentz et al.*, 13 Mont. 406; *City of Helena* v. *Brule et al.*, 15 Mont. 429; *Herbert Importing Company* v. *Hogan*, 16 Mont. 384; *Dusy* v. *Prudom et al.*, 30 Pac. 798; *Martin* v. *DeLodge*, 15 Mont. 343; *Chambers et al.* v. *City of Butte*, 16 Mont. 90; *Butte Butchering Company* v. *Clark*, 19 Mont. 306; *Sherman* v. *Jorgensen*, 39 Pac. 863; *Williamson* v. *Cummings Rock Drill Co.*, 30 Pac. 762.)

J. L. & M. L. Wines, for Respondent.

HUNT, J. So far as material to the question presented in this case for decision, the affidavit of the defendant, Kemper, after setting forth somewhat in detail the facts upon which his case was based, and wherein he avers his own possession of the ground described in the complaint and the entry thereon during the temporary absence of his (the defendant's) cus-

todian of the property, proceeds substantially as follows: Affiant says that after he was served with summons, in the afternoon of April 19th, he delivered it to J. L. Wines, one of his attorneys; that he himself understood the action to be one to eject or put him off of the premises; and that he believed that in all such litigation the defendant had 20 days after service of the complaint and summons in which to appear; and that, when he delivered the papers to his attorney, the attorney told him he had 20 days, and affiant acted under that belief, but that, if he had known that he was required to answer in less time, he would not under any circumstances have permitted judgment to be entered against him, as he was firmly convinced that plaintiffs had no right to the premises involved, or to eject affiant therefrom; and that in making the purchase of the property described in the complaint, and improving the same, affiant had expended about $6,000. Affiant also stated that the judgment was taken against him on April 27th, without his knowledge, and that he was willing to submit to all such terms as the court might impose in the event that the judgment against him was vacated and set aside.

J. L. Wines, attorney for defendant, stated that the complaint and summons in the action were handed to him by the defendant, Kemper, on April 19; that he observed that the complaint was attached to the summons; that he read the prayer of the complaint, and believed that the suit was an ordinary action in ejectment, and made a memorandum on the back of the papers as follows: "Served the 19 April, 1897; twenty days;" and then put the papers away, expecting to prepare a defense within the 20 days which he believed his client had in which to appear. Mr. Wines further said in his affidavit that the statute does not require a copy of the complaint to be served in an action of forcible entry or forcible and unlawful detainer, and the fact that a copy of the complaint in this action was so served misled him, and that by reason of this fact he did not examine or read the summons, and had no idea that the action was one of forcible entry or of forcible and unlawful detainer until after the judgment by

default had been taken, and, furthermore, that, if a copy of the complaint had not been served with the summons, he would have at once examined the summons, and thus would have discovered the nature and character of the action, but that he was entirely misled as to the character of the action, and, had he not been so misled, he would have caused an appearance to be entered by the defendant within the time required by the summons and thus would have saved default.

Two other affidavits were filed in behalf of the defendant, which contained statements of facts in relation to allegations of force contained in the complaint, and denying the truth of the same.

From the earliest decisions of this court, thirty years ago, down to the very latest, the principle has been established that it is within the legal discretion of a trial court to set aside, or to refuse to set aside, a default and judgment thereon, and that, unless it appears that there has been an abuse of such discretion, it is the duty of this court to sustain the district court. This was laid down in *Loeb* v. *Schmith*, 1 Mont. 87 and has been followed in *Whiteside* v. *Logan*, 7 Mont. 373, 17 Pac. 34; *Heardt* v. *McAllister*, 9 Mont. 405, 24 Pac. 263; *Jensen* v. *Barbour*, 12 Mont. 566, 31 Pac. 592; *Mantle* v. *Largey*, 17 Mont. 479, 43 Pac. 633; and *Butte Butchering Co.* v. *Clarke*, 19 Mont. 306, 48 Pac. 303.

Section 2087, Code of Civil Procedure, provides that, in actions of forcible entry or unlawful detainer, the summons is returnable at a date to be designated therein, which shall not be less than 4 nor more than 12 days from its date, and also that the complaint need not be served. The statutes provide a summary remedy when possession is invaded, and their design is to enable one who is ousted to be restored to his original possession as speedily as can be. For these reasons, the time for a defendant to enter appearance is shortened. It was negligent on the part of defendant's counsel to omit to read the summons; and were it not for the fact that a copy of the complaint was served, and that thereby the defendant's counsel might reasonably have had cause to

believe, and did believe, that the action was an ordinary suit in the district court, to be proceeded with as such actions usually are, and that accordingly the defendant had 20 days in which to appear, we should hesitate to affirm the orders appealed from. But upon the whole showing made, although we think the excuses offered by defendant's counsel are far from strong, still it is very evident that he never meant to neglect his client's interests, and that, directly after he knew the fact that a judgment by default had been taken against defendant, he was extemely diligent in moving to set aside the default, and always acted in the best of faith. The defense, too, being plainly a meritorious one on the pleading offered, we cannot disturb the order of the court.

The order appealed from will therefore be affirmed, but all costs of this appeal are hereby ordered to be taxed against defendant respondent.

Affirmed.

PEMBERTON, C. J. and PIGOTT, J., concur.

STATE OF MONTANA, RESPONDENT, v. ED. HOWELL, APPELLANT.

[Submitted May 17, 1898. Decided May 30, 1898.]

Assault and Battery—Justification—Trespass—Instruction.

In October, 1896, defendant bought a house, took possession of and occupied the same until Feb. 2nd, 1897, on which day, one "G," in the temporary absence of the defendant, went to the house and placed an extra lock on the door; upon defendant's return, a difficulty arose between him and "G," during which "G" struck him with a hatchet. On Feb. 3rd, defendant went to the house, removed some personal property of "G's" and then shut and fastened the door; at that time "G" returned to the house and broke open the door; thereupon the defendant made the assault complained of. The court charged the jury as follows: "By 'possession' is not meant a mere temporary and passing occupancy of lands or tenements, but it must be of a lasting, permanent or substantial nature. A person entering on lands during the temporary absence of the owner or person in possession does not thereby acquire a possession of the premises or lands so entered upon." *Held.* that the instruction was erroneous. It is not the law that a person can defend only a lasting, permanent or substantial possession. A person may have a lawful possession, such as he may defend, which is not lasting or permanent.

SAME.—*Held* also error under the above facts to instruct the jury that if they found that "G" was in possession of the building on Feb. 2, and that during his temporary absence on the day following, defendant entered therein—such entry was not sufficient to constitute possession.

SAME.—*Held*, that the evidence shows that the defendant had been in possession of the premises, as owner thereof, for months, and that under Subdivision 3, Section 404 of the Penal Code, he had the right to defend such possession, provided he used no more force than was necessary for that purpose; and that it was error to refuse an instruction to that effect.

Appeal from District Court, Park County, Frank Henry, Judge.

Ed. Howell was convicted of assault in the third degree, and from a judgment rendered on the verdict, and an order denying a motion for a new trial, he appeals. Reversed.

Statement of the case by the justice delivering the opinion.

The defendant was tried in the district court of Park county under an information charging him with an assault in the second degree, committed upon one J. W. Guilford on the 3d day of February, 1897, by beating the said Guilford with a pistol. The jury found the defendant guilty of an assault in the third degree.

The facts, as shown by the record, are substantially as follows: In October, 1896, the defendant purchased a house in the little town of Aldridge, in Park county, of one Walter Hoppe, and took possession and occupied the same peaceably and continuously until February 2, 1897. On that day, in the temporary absence of defendant, Guilford went to the house, and placed a padlock in the staple, beside the padlock with which the defendant locked the door of the house, thereby double-locking the door. Upon defendant's return to the house, a difficulty arose in relation to the possession thereof between himself and Guilford, in which difficulty Guilford struck the defendant with a hatchet, cutting a gash in his face. On the 3d day of February, the defendant went to the house, where he found a man by the name of Bounds, to whom the defendant had theretofore given the privilege of sleeping in and occupying the premises; and, being convinced that Bounds was in collusion with Guilford to oust him from

possession of the house, he ordered him to leave, which, it seems, Bounds did. While Bounds was gathering up his effects, the defendant put Guilford's bedding out on the sidewalk, and shut and fastened the door. Guilford came to the house about this time, and, as the evidence tends to show, looked through the windows, and saw defendant in the house. Guilford then, according to his own testimony, backed off some few steps, and rushed upon the door, breaking the same open by tearing or knocking off the inside latch. The defendant thereupon caught Guilford, and struck him over the head with a pistol, which the defendant testified he had with him on account of threats made against him by Guilford. After considerable quarreling and disturbance, the parties agreed to arbitrate whatever differences they had in relation to the right of possession of the house, which truce resulted in leaving the defendant in possession of the premises. It seems that Guilford, while cut about the head, received no serious injuries from the defendant, and that the defendant did not succeed at the time by the force he used in ejecting Guilford from the house.

From the judgment rendered on the verdict of assault in the third degree, and from an order denying his motion for a new trial, defendant appeals.

Smith & Wilson, for Appellant.

(Citing: *Goshen* v. *The People*, 44 Pac. 503; *Marsh* v. *Bristol*, 32 N. W. 645; *Circle* v. *State*, 22 S. W. 603; *Smith* v. *Reeder*, 15 L. R. A. 172; Greenleaf on Evidence, Vol. 3, § 65 (13 Ed.); *id.* Vol. 2, § 98; *Parsons* v. *Brown*, 15 Barbour 590.)

C. B. Nolan, Attorney General, for the State.

PEMBERTON, C. J. The only errors assigned by counsel are directed to the giving and refusing of instructions by the district court at the trial.

The court gave the following instructions: "No. 14. By

'possession' is not meant a mere temporary and passing occupancy of lands or tenements, but must be of a lasting, permanent, or substantial nature. A person entering on lands during the temporary absence of the owner or person in possession does not thereby acquire a possession of the premises or lands so entered upon. No. 15. If you find from the evidence of the case the witness Guilford was in possession of the building where the assault charged is alleged to have been committed, on the 2d day of February, and that during his temporary absence, on the day following, defendant entered said building during said absence, such entry was not sufficient to constitute a possession of the premises."

The court also refused to give the following instruction requested by defendant: "No. 26. The court instructs the jury that if you find and believe from the evidence that the defendant, Ed. Howell, was on the 3d day of February, 1897, on the inside of the building where the assault is alleged to have been committed, and that he had closed and fastened the doors thereof, then the defendant was in possession of said building, and the prosecuting witness, Guilford, had no right to forcibly enter the said building; and, if you find from the evidence he did so, then the defendant had the legal right to forcibly eject said Guilford by using only such force and violence as was necessary to eject said Guilford therefrom."

The action of the court with reference to the giving and refusing of these instructions is urged as error.

The first part of instruction No. 14, wherein the court undertakes to define what kind of possession a person may lawfully defend, is erroneous. We do not think that a person, under the law, can only defend a "lasting, permanent, or substantial" possession. It is doubtless true that one who unlawfully enters into the possession of premises during the temporary absence of the rightful possessor acquires no rightful possession thereof. But in this instruction the court does not tell the jury that the entry in the temporary absence of the rightful possessor must be unlawful. If a person wrong-

fully in possession of a house leaves it temporarily, why may not the rightful possessor during such absence peaceably enter and take and defend his possession? And, besides, a person may have a lawful possession, such as he may defend, which is not lasting or permanent.

Instruction No. 15 is likewise erroneous. The evidence shows that, during the temporary absence of Howell from the house, Guilford took possession thereof, on the 2d day of February. According to instruction No. 14, such entry during Howell's temporary absence gave Guilford no lawful possession. Still the court charged the jury, in instruction No. 15, that Howell's entry into the house, which, according to the evidence, was his own property, on the 3d day of February, during the temporary absence of Guilford, did not constitute possession. If Howell's entry into his own house during the temporary absence of Guilford, who had gotten possession by force, after beating Howell with a hatchet and driving him away, gave Howell no possession, how could Guilford get lawful possession of the house in the manner the evidence shows he got it?

Instruction No. 26, which the court refused to give to the jury, we think stated the law correctly, and should have been given. Under Subdivision 3, Section 404 of the Penal Code, a person in lawful possession of real property may defend it, if he does not use more force or violence than necessary to prevent a trespass upon or offense against the premises. The evidence shows Howell had been in the peaceable possession of the premises, without any question, for months, as the owner; and he had a right to defend such possession, provided he used no more force than was necessary for that purpose. So the only question, under the evidence, was, did the defendant in this case use more force than was necessary to defend his possession against the trespass of Guilford? The refused instruction submitted this question fairly to the jury, and it was error to refuse it. If a man may not lawfully defend his property—his home—by the use of whatever force it is necessary to use under the circumstances of the case, then

he is at the mercy of every tramp, trespasser, or even burglar, who comes along, and enters and takes possession, during his temporary absence therefrom.

On account of the foregoing errors, we think the judgment and order appealed from should be reversed, and the cause is remanded, with directions to the district court to grant a new trial.

Reversed and Remanded.

HUNT and PIGOTT, JJ., concur.

IN RE RASH'S ESTATE. ELIZABETH HADLEY, APPELLANT, v. MANUEL RASH ET AL., RESPONDENTS.

[Submitted May 19, 1898. Decided June 6, 1898.]

Marriage—Presumption—Burden of Proof.

Plaintiff and the intestate, Daniel Rash, were married in 1858. In 1864 the intestate left plaintiff and never lived with her thereafter. In 1872 plaintiff married one "H," and they lived together as man and wife thereafter. In 1894 the intestate and the defendant Berthena Rash intermarried and lived together as man and wife until the death of intestate. This action was brought by plaintiff to obtain a decree adjudging her to be the surviving widow of Daniel Rash, and as such to be entitled to share in the distribution of his estate. There was no evidence of any divorce dissolving the marriage relation existing between plaintiff and the deceased; although the complaint alleged that no such divorce had ever been granted, which was denied by the answer. *Held*, that, in the absence of any evidence to the contrary, the presumption is that the marriage between intestate and the defendant Berthena Rash was valid, and that the burden was on plaintiff to prove that no divorce had been granted.

Appeal from District Court, Missoula County; F. H. Woody, Judge.

ACTION by Elizabeth Hadley against Manuel Rash and others to establish her claim as widow of Daniel Rash, deceased. From a judgment for defendants, plaintiff appeals. Affirmed.

Statement of the case by the justice delivering the opinion.

This is an action brought by plaintiff for a decree adjudging her to be the surviving widow, and as such entitled to share in the distribution of the estate, of Daniel Rash, who died intestate in Missoula county upon the 14th day of March, 1895. The record shows the findings of fact to be substantially as follows, and which findings, it is conceded, are supported by the evidence: First, that the plaintiff and Daniel Rash were married in Iowa about November 28, 1858, and lived together as man and wife until 1864, when Daniel Rash left the plaintiff, going west, and never lived with the plaintiff in any relation after that time; second, that Manuel Rash and Elvira Lowdermilk are children of plaintiff and Daniel Rash, and as such entitled to share in the distribution of the estate of Daniel Rash; third, that in the year 1872 the plaintiff intermarried with one William Hadley, and they lived and cohabited as man and wife from the date of their marriage until the death of Daniel Rash; fourth, that Berthena C. Rash and Daniel Rash were formally married in the county of Missoula, this state, about the month of January, 1894, and lived and cohabited together as man and wife from the date of their marriage until the death of Daniel Rash. The court approved the findings of the jury, and decided, as a conclusion of law, that the defendant Berthena C. Rash was at the time of the death of said Daniel Rash his legal wife, and as such is now his legal surviving widow, and entitled to share in the distribution of his estate. In accordance with the findings of fact and conclusions of law, the court decreed the defendant Berthena C. Rash to be the legal surviving widow of Daniel Rash, deceased, and as such entitled to share in the distribution of his estate. The right of Manuel Rash and Elvira Lowdermilk to share as heirs in the distribution of the estate of Daniel Rash is not questioned by any of the parties to this suit. The plaintiff appeals from the judgment of the court decreeing Berthena C. Rash to be the lawful surviving widow of Daniel Rash, deceased, and as such entitled to share in the distribution of his estate.

J. M. Dixon and *Bickford, Stiff & Hershey*, for Appellant.

(Citing: Vol. 2 Nelson on Divorce and Separation, §§ 576–577; *Boulden* v. *McIntyre*, 21 N. E. 446; *Dixon* v. *People*, 18 Mich. 84; *Harris* v. *Harris*, 8 Ill. App. 57; *Jackson* v. *Jackson*, 94 Cal. 454; *Ellis* v. *Ellis*, 13 N. W. 65; *Barnes* v. *Barnes*, 57 Io. 851.)

Thos. C. Marshall and *Jos. K. Wood*, for Respondent Berthena C. Rash.

Every reasonable and fair presumption will be indulged for the purpose of upholding a marriage, and establishing the legitimacy of the offspring. When the celebration of a marriage is once shown, the contract of marriage, the capacity of the parties, and in fact everything necessary to the validity of the marriage, in the absence of proof to the contrary, will be presumed. (*Cartwright* v. *McGowan*, 121 Ill. 396–7 and cases cited; 1 Bishop on Marriage and Divorce, § 457; Lawson on Presumptive Evidence, 104, 107; *People* v. *Calder*, 30 Mich. 85; *Boulden* v. *McIntyre*, 21 N. E. 445; *Erwin* v. *English*, 23 Atl. 753; *Johnson* v. *Johnson*, 114 Ill. 611; *Cartwright* v. *McGowan*, 121 Ill. 406; *Harris* v. *Harris*, 8 Ill. App. 57; *Carroll* v. *Carroll*, 20 Tex. 731; *Hull* v. *Rawls*, 27 Miss. 471; *Yates* v. *Houston*, 3 Tex. 449; *People* v. *Dixon*, 18 Mich. 84; *Blanchard* v. *Lambert*, 43 Iowa 228; *United States* v. *Chaves*, *supra*; *In Re Edwards*, 10 N. W. 793; Lawson's Presumptive Evidence, pp. 435–448 and cases cited; Jones on Evidence, §§ 13–100 and cases cited; Greenleaf on Evidence, vol. 1, § 35; Bishop on Marriage and Divorce, § 444.) To require appellant, when she attacked the validity of respondent's marriage to Daniel Rash, in 1894, to overcome the validity of said marriage by showing that the marriage of 1858 has not been dissolved by divorce, was not a violation of any rule of evidence. (Jones on Evidence, vol. 1, §§ 177–8; Greenleaf on Evidence, vol. 1, § 80; Am. and Eng. Enc. Law, pp. 42–48.)

S. C. Murray and *M. L. Crouch* also appeared for Respondents.

PEMBERTON, C. J. Counsel for appellant contend the decree of the court adjudging respondent Berthena C. Rash to be the legal surviving widow of the deceased, Daniel Rash, and as such widow entitled to share in the distribution of his estate, is not supported by the evidence, and is contrary to law. It is argued that this decree is based upon the legal presumption that at some time and place a divorce had been granted, by some court of competent jurisdiction, dissolving the marriage relation entered into between the appellant and Daniel Rash in Iowa in the year 1858. There is no evidence of such divorce. Counsel contend that the court held that it was incumbent upon appellant to prove that there had not been such divorce, and that it was error on the part of the court to presume such divorce, in the absence of evidence to the contrary. It is contended that there is nothing in the pleadings suggesting that there ever was such divorce of the parties. In the complaint, however, there is an allegation that the bonds of matrimony entered into between appellant and Rash had never been dissolved by divorce. This allegation, and all other allegations not admitted, are denied generally by the answer.

Counsel say that to prove that there had never been a divorce between the parties would have required the appellant to prove a negative, which in this case, they say, would have been impossible.

Treating the subject of proving a negative, Nelson, in his recent work on divorce and separation (Vol. II, Section 580), says. "But this difficulty of proof is not unusual in such cases, since it is the rule that all presumptions shall be made in favor of marriage, where matrimony was the desire of the parties."

The argument of counsel for the appellant overlooks the real issue in this case. It is an admitted fact that the respondent and Daniel Rash were married in Missoula county in January, 1894, and lived together as husband and wife until the death of Rash. It is also a fact that the appellant attacks the validity of this marriage, and that this marriage must be decreed to be invalid before appellant can be held to be the legal

surviving widow of Rash, and entitled, as such widow, to share in the distribution of his estate.

What burdens as to proof, then, does the law, under such circumstances, devolve upon the appellant?

Bishop, in his work on marriage and divorce (Vol. I, Section 457), lays down the rule in such cases as follows: "'*Semper præ- sumitur pro matrimonio.*' Every intendment of the law is in favor of matrimony. When a marriage, therefore, has once been shown, however celebrated, whether regularly or irregularly, or however proved, whether directly or by circumstantial evidence, the law raises a strong presumption in favor of its legality; so that the burden is with the party objecting, throughout, and in every particular, to prove, against the constant pressure of this presumption of law, that it is illegal and void. And it has been considered that the validity of a marriage cannot be tried like any other question of fact which is independent of presumption, because the law, besides casting the burden of proof upon the objecting party, will still presume in favor of marriage, and this presumption increases in strength with the lapse of time through which the parties are cohabiting as husband and wife. It being for the highest good of the parties, of the children, and of the community, that all intercourse between the sexes, in its nature matrimonial, should be such in fact, the law, when administered by enlightened judges, seizes upon all presumptions both of law and of fact, presses into its service all things which can help it, in each particular case, to sustain marriage, and repel the conclusion of unlawful commerce."

In *Boulden et al.* v. *McIntire*, 21 N. E. (Ind.) 445—a case very similar to the one at bar, though not so strong in its essential facts—the court collates the leading cases involving the questions under discussion here, and comes to this conclusion: "As we have seen from the authorities above cited, the law requires the party who asserts the illegality of a marriage to take the burden of that issue, and prove it, though it may involve the proving of a negative."

In *Klein* v. *Laudman*, 29 Mo. 259, a case involving this doctrine, the court said: "There was not any evidence that the first husband of Mrs. Klein was dead, but, if this had been established, we think she was entitled to the benefit of the favorable presumption that the first marriage had been dissolved by divorce."

We cite, to the same effect, *Erwin* v. *English*, 23 Atl. 753; *Johnson* v. *Johnson*, 114 Ill. 611, 3 N. E. 232; *Carroll* v. *Carroll*, 20 Tex. 731; *Cartwright* v. *McGown*, 121 Ill. 388, 12 N. E. 737; and cases cited in *Boulden* v. *McIntire*, *supra*.

In *Teter* v. *Teter*, 101 Ind. 129, speaking of the presumptions in favor of the validity of a marriage, the court uses this strong langurge: "The presumption in favor of matrimony is one of the strongest known to the law. The law presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy."

We think the authorities are practically uniform upon the questions presented in this appeal. In this case the appellant took upon herself the burden of showing the marriage between the respondent and Rash to be invalid. In order to do so, it was incumbent upon her to show that there never had been a divorce granted to Rash from her. It was incumbent upon her to show this fact, notwithstanding it required her to prove a negative. It was no more difficult for her to prove that there had been no such divorce, than it would have been for respondent to prove there had been a divorce granted to Rash. The appellant, when she married Hadley, certainly acted upon the presumption that Rash was either dead, or had obtained a divorce from her. Why, then, might not the respondent, with propriety, and lawfully, presume, 30 years after Rash had separated from appellant, that there was no legal impediment in the way of her marriage in good faith with him?

We are unable to discover a circumstance in this case that does not move us strongly to indulge the legal presumption of the validity of the marriage between the respondent and Rash.

We are impelled to such conclusion in the interest of morality, innocence, and the sancity of the marriage relation. We are given no good reason why we should depart in this case from what seems to us to be a well-settled and just rule of legal presumption, simply to gratify the cupidity of the claimant, that hesitates at no consideration of morality or innocence, or even the preservation of her own good name and honor, in her reckless struggle for gain.

The judgment appealed from is affirmed.

Affirmed.

HUNT and PIGOTT, JJ., concur.

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EUGENE T. WILSON, AS RECEIVER OF THE FIRST NATIONAL BANK OF HELENA, RESPONDENT, v. HERVEY BARBOUR, APPELLANT.

[Submitted May 4, 1898. Decided June 6, 1898.]

Attachment—Discharge of—Review of Evidence.

1. On an appeal from an order denying an application to discharge a writ of attachment which is heard wholly upon affidavits, the Supreme Court will review the evidence.
2. The complaint stated seven separate and distinct causes of action upon contract for the direct payment of money. Each cause of action was one upon which plaintiff might have obtained a writ of attachment. An affidavit for an attachment was filed, which stated all the facts necessary to entitle the plaintiff to a writ of attachment as to each of five of the causes of action, and the statement as to each of the five was complete in itself. As to the other two causes of action, the affidavit was defective, because it did not state that the debts mentioned therein had not been secured, or, if ever secured, that the security had become valueless. *Held*, that a writ of attachment which stated separately the amount of the demand in each of the five causes of action properly stated, also that of each of the remaining two, and also the aggregate amount of all the claims, was irregular but not void; and voidable only so far as it included the demands in the two causes of action referred to.
3. Where a writ of attachment has been issued upon an affidavit which is sufficient as to five of seven causes of action, but insufficient as to the remaining two, a motion to discharge the whole writ is properly denied.

Appeal from District Court, Lewis and Clarke County; H. C. Smith, Judge.

Statement of the case by the justice delivering the opinion.

APPEAL from an order refusing to discharge a writ of attachment. On August 6, 1897, the receiver of the First National Bank of Helena, Montana, filed his complaint, setting up seven causes of action arising out of a like number of express contracts for the direct payment of money, executed by the defendant to said bank. Promissory notes are the subjects of the several causes of action; the first being a note for $83.05, the second one for $31,986.50, the third one for $1,603.30, the fourth one for $19,771.31, the fifth one for $22,924.18, the sixth one for $2,860.79, and the seventh a note for $103.90. Each of the first three notes provides for attorney's fees. With attorney's fees and interest, the aggregate amount alleged to be due is $99,404.90. Summons was issued. An affidavit for attachment was filed, which, among other things, stated, in effect that defendant was indebted to plaintiff in the sum of $99,404.90 upon the notes mentioned. Each demand was separately stated in the affidavit, in conformity with the complaint. The affidavit was sufficient in form as to each cause of action, except the sixth and seventh. As to the debts alleged in the first and second causes of action, the affidavit stated that the payment of neither had been secured by any mortgage, lien or pledge. The debts which are the subjects of the third, fourth and fifth causes of action were stated to have been originally secured, but that the security had, without any act of the plaintiff or the bank, become valueless. The affidavit was silent, however, with respect to whether the debts alleged in the sixth and seventh causes of action were, or had been, secured. An undertaking having been given, the clerk issued a writ of attachment to the sheriff of Silver Bow county, requiring him, among other things, to attach and safely keep so much of the non-exempt property of the defendant in his county as would be sufficient to satisfy the plaintiff's demands, aggregating $99,404.90. The writ recited the amounts of the several debts alleged in the complaint and affidavit, each statement being separate and distinct from the others. Under the writ the sheriff attached, by garnishment, certain debts owing to, and certain credits owned by, defendant, and 5,365 shares

of the capital stock of the Helena & Frisco Mining Company. On August 27, 1897, defendant gave notice of a motion to discharge the writ of attachment, the grounds being that it was improperly and irregularly issued, for the reason that the affidavit mentioned is false in its statement that the payment of the debt evidenced by the note for $31,986.50 was unsecured, and is false in stating that the security given for the payment of the $1,603.30 note had, without the act of plaintiff or of the bank, become valueless, and for the further reason that the affidavit is insufficient in that it does not allege that the notes of $2,860.79 and $103.90 had not been secured, or, if originally secured, that such security had become valueless. In support of the motion was filed the affidavit of the defendant, and this affidavit also stated that the debts which were the subjects of the sixth and seventh causes of action were secured by mortgages. On February 14, 1898, plaintiff caused to be filed in opposition to the motion an affidavit, and also many documents and letters, relating either nearly or remotely to the matters presented by the motion. On February 17th the defendant served an amendment to his notice of motion by incorporating therein an additional ground for the discharge of the writ, to-wit: That the affidavit is false in stating that the payment of the indebtedness evidenced by the promissory note for $19,771.31 had never been secured, whereas that note and the one for $31,986.50 were secured by a pledge of personal property worth $70,000. To support the motion as amended, several new affidavits were filed, and plaintiff opposed the motion by counter proof in the form of affidavits and other evidence.

Upon the hearing the court found all the allegations in the affidavit for attachment to be true, and that the affidavit was not sufficient to entitle the plaintiff to an attachment on the indebtedness evidenced by the notes for $2,860.79 and $103.90, the subjects of the sixth and seventh causes of action, respectively, and that the affidavit was sufficient to entitle the plaintiff to an attachment upon each of the demands except those embraced in the sixth and seventh causes of ac-

tion, as to which it was silent. The court further found that, since the plaintiff had made no affidavit of attachment as to the last two causes of action mentioned, the amount of plaintiff's demand, $99,404.90, stated in the writ, and for which the sheriff was directed to attach, was too large, by the aggregate of the debts described in those two causes of action. The district judge then stated that the only question remaining was "the legal effect of the amount of the last two causes of action, for which plaintiff was not entitled to an attachment, being included in the amount for which the sheriff was directed to attach, and this case is continued for further argument upon said proposition of law." By leave of court the plaintiff then filed an amended affidavit for attachment, in which the omissions to show that the debts mentioned in causes of action numbered 6 and 7 had not been secured, or, if originally secured, that the security had become valueless, are supplied, or attempted to be supplied. The court thereupon denied the motion to discharge the writ, and the defendant appeals.

Clayburg, Corbett & Gunn, for Appellant.

Wm. Wallace, Jr., for Respondent.

PIGOTT, J. Sections 914, 915, and 916 of the Code of Civil Procedure are as follows:

"Section 914. The defendant may also at any time, either before or after the release of the attached property, or before any attachment shall have been actually levied, apply on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to a judge thereof, that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued.

"Section 915. If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the attachment was made.

"Section 916. If upon such application, it satisfactorily

appears that the writ of attachment was improperly or irregularly issued, it must be discharged. But the court or judge may allow the plaintiff to amend his affidavit or undertaking."

1. The first ground of the motion to discharge the writ of attachment is directed to those parts of the affidavit which have to do with the several debts upon which causes of action numbered 2, 3, and 4 are respectively based. The defendant contended that the averments of the affidavit were false, in stating that the payment of neither the $31,986.50 note, nor the note for $19,771.31, had ever been secured, and in stating that the security for the payment of the $1,603.30 note had become valueless. Documentary evidence only was received upon the hearing of the motion, and a substantial conflict existed. We must therefore determine the merits by deciding upon the weight of the evidence. (*Newell* v. *Whitwell*, 16 Mont. at page 254, 40 Pac. 866.) To set out or discuss the evidence will serve no useful purpose. A careful examination satisfies us that it fairly preponderates in favor of plaintiff, and we are therefore of opinion that the trial court did not err in finding the statements in the original affidavit to be true.

2. The original affidavit was sufficient to warrant the issuance of a writ of attachment upon five of the seven causes of action stated in the complaint. Omission to show that payment of the debts evidenced by either of the notes which are the subjects of the sixth and seventh causes of action had not been secured, or, if ever secured, that the security had become valueless, made the affidavit insufficient as to these two demands, and as to them only. Seven different express contracts for the direct payment of money were united in the one complaint, in seven separately stated causes of action, each of which might have been the basis of an action, and upon which plaintiff might have obtained a writ. The statement of each cause of action was practically a complaint in itself. No interdependence existed, but each cause was in all respects as independent of the other as if it were the sole matter in the complaint. While the affidavit stated the gross amount of the seven demands, the law did not require such statement.

It was merely immaterial and harmless, and may be rejected as a redundancy. The affidavit did, however, show the conditions existing as to each of the first five causes of action which authorized a writ to issue; and the affidavit was independent and separate in respect of each demand, so that, in effect each demand, or cause had its own separate and appropriate affidavit for attachment, dependent in no way upon the insufficient affidavit or showing as to the sixth and seventh causes. Section 893 of the Code of Civil Procedure requires the writ to state the amount of the plaintiff's demand, in conformity with the complaint. In obedience to this command, the writ stated the amounts of the several demands upon which the first five causes of action were founded in conformity with the complaint, but also stated the amounts of the two other demands, as well as the aggregate of all the claims. In this the writ was irregular. In prescribing that the writ shall state the demand, in conformity with the complaint, the legislature doubtless had chiefly in view the usual case of a complaint stating but a single cause of action, or one in which are united several causes of action, all of which are shown to be demands for which attachment may issue. The intention of the legislature, however, was to provide for all cases of attachment, and the language must be given such meaning as will effectuate the purpose. Reasonably interpreted in the light of the other provisions of the attachment law, the requirement means that the clerk shall insert in the writ the amount of the plaintiff's demand or demands, in conformity with that cause of action, or those causes of action, set out in the complaint, upon which, as shown by the affidavit, plaintiff is entitled to attach. When the writ so states the amount of the demand, in conformity with that portion of the complaint setting up such demand, the ministerial duty of the clerk in that behalf is duly performed, and the statutory requirement is satisfied. In such case no irregularity would exist. If, however, it were shown that the affidavit was false in its material averments as to every demand, or was, by mistake or through inadvertence,

untrue as to some, but not as to all, the entire writ would be improperly issued in the one case, while in the other the impropriety would not permeate the writ, but would affect that portion only as to which the affidavit was untrue; but neither the writ, nor any portion of it, would be irregular in either event. If, as in the case at bar, the clerk inserts in the writ the amount of a demand for which the affidavit is wholly insufficient, the writ in that respect would be at least irregular, if not improper as well as irregular.

Upon its face the writ of attachment was perfect. By reference to the affidavit upon which it is sued, however, it appeared that the amount stated in the writ was too large, by the aggregate of the demands upon which the sixth and seventh causes of action were based, which demands were separately stated in the writ, as well as in the complaint and affidavit. The writ was not void, nor was it, in its entirety, voidable. (See *Hubbard* v. *Haley*, (Wis.) 71 N. W. 1036; *Emerson* v. *Thatcher*, (Kan.) 51 Pac. 50.) Though the amount stated in the writ be greater than that for which it should issue, yet, in the absence of bad faith in claiming the excess, the writ will be upheld for so much of the demand as is shown to be properly included. This rule is within the principle announced in *Newell* v. *Whitwell*, 16 Mont. 243, 40 Pac. 866, and would seem to be a corollary of the doctrine declared in *Mendes* v. *Freiters*, 16 Nev. 388. Defendant's motion was directed to the whole writ, which he asked the court to discharge. He did not move a discharge as to the sixth and seventh demands, in respect of which, only, the writ was irregular. Its irregularity consisted in stating the amount of these two demands, and including them in the total sum recited. The statements of the affidavit were sufficient to authorize a writ for five several demands, which were, in fact and in statement, clearly distinct and separate in all respects from the insufficient averments touching the two demands irregularly included in both affidavit and writ. The irregularity did not go to the jurisdiction of the court. (See *Emerson* v. *Thatcher*, *supra*.) The motion to wholly discharge the

writ because the affidavit omitted to state grounds as to two out of seven demands was too broad. It was in the nature of a demurrer for insufficiency, interposed generally to a complaint which states facts sufficient to constitute one cause of action out of several attempted to be pleaded. It was akin to a motion seeking to strike from a pleading certain specified matter charged, as a whole, to be immaterial, when a part is material. In the one case the demurrer must be overruled, and in the other the motion denied. (See *Hubbard* v. *Haley*, *supra.*) The whole writ should not be discharged for an irregularity or even impropriety in respect of one or more demands stated therein, when the demands properly included are clearly separated and distinguished in the writ itself from the former. Defendant's remedy was by motion to discharge, modify, or amend the writ as to the demands irregularly inserted therein. This the court has full power to do, under common-law principles (*Tilton* v. *Cofield*, 93 U. S. 167), as well as by virtue of Sections 110 and 774, Code Civil Procedure. Unlike the supposed summons in *Sharman* v. *Huot*, 20 Mont. 555, 52 Pac. 558, the writ in question contained something to amend and amend by. Its only fault was an excess in amount, which excess was by the writ itself segregated from the demands properly stated. The motion was rightly denied.

3. Since the motion to discharge the writ *in toto* was properly denied, and since defendant did not ask a discharge, modification, or amendment of the writ in respect of the demands which should not have been included, consideration of the action of the court below in permitting an amendment to the affidavit for attachment so as to supply the omission of the original to show facts warranting an attachment is unnecessary to a determination of this appeal. The original affidavit was in no measure a compliance with the statute as to the $2,860.79 or $103.90 demand. It did not show even an attempt to state the facts upon which a writ would be authorized upon these demands. Defendant asks us to decide whether such total omission may be supplied by amendment.

Whatever we might here say upon this interesting and difficult question would be *dictum*, and hence we prefer to express no opinion.

The order denying the motion to discharge the writ of attachment will be affirmed, and it is so ordered.

Affirmed.

PEMBERTON, C. J. and HUNT, J., concur.

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CALVIN BEACH ET AL., APPELLANTS, v. SPOKANE RANCH AND WATER CO., RESPONDENTS.

[Submitted May 13, 1898. Decided June 13, 1898.]

Stipulations of Attorneys—Laches.

1. An order cannot be based upon a stipulation between the attorneys in the case, where the stipulation is denied by one of the attorneys, and it was neither made in writing, nor made in open court and entered in the minutes. (Section 398, Code of Civil Procedure, and Rule 21, First District Court, construed.)
2. It cannot be claimed that an order was based upon Section 774, Code of Civil Procedure, which provides for relief on the ground of mistake, inadvertance, surprise or excusable neglect, when the application for the order was not made for any such relief.
3. One who applies for the modification of an order within a reasonable time after he has received notice that the same has been made, is not guilty of *laches*.

Appeal from District Court, Lewis and Clarke County.

ACTION by Calvin Beach and others against the Spokane Ranch & Water Company. An order was made granting additional time to prepare a bill of exceptions and move for a new trial, the order reciting that it was made with plaintiffs' consent. From an order denying a motion to strike out this recital, plaintiffs appeal. Reversed.

McConnell & McConnell, for Appellants.

Sanders & Sanders, for Respondent.

PIGOTT, J. Appeal from a special order made December 28, 1897, after final judgment. On October 11, 1897, the

district court made the following order, which was entered in the minutes: "On motion of counsel for defendant, and by consent of plaintiffs, court this day granted 30 days additional time to defendant in which to prepare, serve, and file statement on motion for new trial and bill of exceptions herein." On December 28, 1897, plaintiffs moved the court to correct the order so entered by striking out such portion thereof as shows the consent of plaintiffs thereto. After a hearing an order was made denying the motion, and from this order plaintiffs appeal.

Testimony was given tending to prove prior oral consent out of court by counsel for plaintiffs to the extension of 30 days which the order granted; while plaintiffs' counsel testified to the effect that such consent was to an enlargement of 10 days only. It clearly appeared, however, that whatever agreement was made or consent given was oral only, and prior to October 11, and was not made or given in court.

We think the motion should have been granted. Subdivision 1, of Section 398, of the Code of Civil Procedure enacts that an attorney and counselor has authority "to bind his client in any steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise." Rule 21 of the court below is as follows: "Agreements. No agreement or consent between the parties, or their attorneys, in respect to the proceedings in a cause, will be regarded by the court, unless the same shall have been in open court and at the time entered in the minutes, or unless the same shall have been in writing, subscribed by the party against whom the same may be urged, or by his attorney. And it shall be the duty of the party relying upon any such minute entry to see that the same is duly entered."

It is, perhaps, scarcely necessary to observe that neither the statute nor the rule quoted was designed to prevent the enforcement by the courts of executed oral agreements or stipulations admitted by the party or his attorney against whom they are alleged, although neither reduced to writing

nor made in open court. (*Reclamation Dist.* v. *Hamilton*, (Cal.) 44 Pac. 1074; *Johnson* v. *Sweeney*, (Cal.) 30 Pac. 540; *Smith* v. *Whittier*, (Cal.) 30 Pac. 529; *Simpson* v. *Budd*, (Cal.) 27 Pac. 758.) But in the case at bar the oral agreement which defendant claims was made out of court by plaintiffs' counsel is denied by them, and it is affirmatively shown that plaintiffs' attorneys were not present when the order of October 11th was made, and hence under the command of the statute, the court should have disregarded it. The presumption that the order stated the fact in respect of consent was rebutted by undisputed proof. Montana adopted Section 398 from California after interpretation by the courts of that state. As said by Mr. Justice Harrison, speaking for the court in *Smith* v. *Whittier*, *supra*, the obvious purpose of the section is to provide that, "whenever the attorney shall enter into an agreement for the purpose of binding his client, there shall be such record thereof as will preclude any question concerning its character or effect, and that the extent of the agreement may be ascertained by the record—if oral, that it shall be entered in the minutes; and if written that it shall be filed with the clerk." The statute plainly contemplates that the agreement, unless in writing, shall be made or ratified in open court. No claim is advanced that the agreement alleged complied with either requirement.

Whether, within the principles announced in *Stevenson* v. *Cadwell*, 14 Mont. 311, 36 Pac. 185; *Martin* v. *De Loge*, 15 Mont. 343, 39 Pac. 312; *Symons* v. *Bunnell* (Cal.) 20 Pac. 859, and *United States* v. *Breitling*, 20 How. 252—and under the circumstances disclosed—the court rightly suspended Rule 21, *supra*, so as to except the case at bar from its operation, we do not decide. It is sufficient to hold that the provision of the statute has been disregarded. Neither in their briefs nor oral arguments have counsel cited or called attention to Section 398, from which we infer that the error committed by the learned trial judge was occasioned by the omission of counsel to invoke the enforcement of its provisions.

Defendant insists with earnestness that the attorneys for plaintiffs delayed moving a correction of the order for some 46 days after obtaining knowledge of its existence, and are therefore guilty of *laches.* It appears, however, that the 30 days' extension had expired before they were advised of the order, and that they proceeded without unreasonable delay to attack its integrity; and it further appears that defendant served its proposed statement within the time granted by the order. So it would seem that defendant was not injured, nor its legal rights imperiled or invaded, by the delay.

It is further contended that, under the provisions of Section 774 of the Code of Civil Procedure, the court below might have relieved defendant against a proceeding taken against it through its mistake, inadvertence, surprise or excusable neglect. But defendant did not ask for such or any relief. Conceding as correct the doctrine of *Stonesifer* v. *Kilburn* (Cal.) 29 Pac. 332, and *Robertson* v. *Williams*, 81 Cal. 268, 22 Pac. 665, the facts in this case do not warrant its application.

Defendant next urges that the motion was rightly denied because plaintiffs, on November 10th, accepted the proposed statement, offered amendments thereto, and participated in the settlement, all without protest or objection. If this be true, there can be no doubt that plaintiffs may not successfully complain of the service out of time; for the objection that the proposed statement was not served in time must be reserved before offering amendments, or at the time they are offered, and, if not so reserved, the objection is forever waived. (Hayne on New Trials and Appeal, Secs. 145, 146; *Harrigan* v. *Lynch*, 21 Mont. 36, 52 Pac. 642; *Sweeney* v. *Great Falls and Canada Railway Co.*, 11 Mont. at page 37, 27 Pac. 348.) There is, however, nothing in the record certified to us which tends to support the assertion of counsel; and, if there were we do not perceive in what way such fact could enable us to say, upon the present appeal, that the order of October 11th should stand. The sole question presented is whether the court below, in making that part of the order attacked, failed to observe and give effect to the provisions of

Section 398 prescribing the manner in which attorneys may exercise their authority.

Holding, as we do, that the supposed agreement recited in the order of October 11th was not made in the mode prescribed by the statute, it follows that the order of December 28, 1897, must be reversed, and the court below directed to correct the order of October 11th by striking therefrom the words, "by consent of plaintiffs;" and it is so ordered.

Reversed.

PEMBERTON, C. J., and HUNT, J., concur.

W. J. SWEENEY ET AL., APPELLANTS, *v.* PETER DARCY AND JOHN ZIMMERMAN, SHERIFF, RESONDENTS.

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[Submitted May 18, 1898. Decided June 7, 1898.]

Replevin—Jury—Possession, Undisputed Evidence of—Instruction—Presumption of Ownership—Lease.

1. REPLEVIN.—*Jury.*—In an action of replevin, the defendant sheriff attempted to justify under a writ of execution issued from a justice's court, but did not offer in evidence the judgment; the court instructed the jury to disregard all evidence offered to prove justification, but allowed the jury to take to the jury room and consider the summons, account and execution; to which action of the court the plaintiff objected. *Held*, error.
2. REPLEVIN.—*Possession, Undisputed Evidence of.*—Where it appears without any contradiction that the plaintiff was in possession of the property at the time it was taken by the defendant, it is error not to instruct the jury to that effect.
3. SAME.—The possession of personal property is *prima facie* evidence of ownership.
4. SAME.—*Lease.*—Sheep were leased under two separate leases. The first lease provided that, at the end of the term, the lessees were to return to the lessors the original band and half the increase, and to make good any loss in the original band in excess of 15 per cent. Both leases provided that the title to both bands and the increase should remain in the lessors during the term of the lease and until the sheep were redelivered to the lessors. The lessees having suffered a severe loss in the first band and being in financial difficulties, surrendered to the lessors the band included in the second lease and 58 more than they were entitled to under the terms of the first lease, it being understood that the latter should be kept to make good any loss found to exist in the first band when the final division should be made in accordance with the terms of the lease. *Held*, first, that the title to the sheep remained in the lessors until final division took place. Second, that neither of the lessees could sell the sheep and that the same were not subject to an execution against their property.

Appeal from District Court, Flathead County; Charles W. Pomeroy, Judge.

REPLEVIN by W. J. Sweeney and another against Peter Darcy and John Zimmerman, as sheriff, etc. Judgment for defendants, and plaintiffs appeal. Reversed.

Statement of the case by the justice delivering the opinion.

This is an action in replevin, to recover 225 head of sheep alleged to have been taken from the appellants by the respondent Zimmerman, as sheriff of Teton county, and who acted under an execution issued at the instance of his co-respondent in an action which the latter brought in a justice's court against the firm of Graves & Harris. The respondent Darcy filed an answer, denying generally all the allegations of the complaint. Zimmerman's answer admits the taking and attempts to justify under a judgment and execution issued thereon in the action above referred to, and alleges, on information and belief, that the sheep belong to the firm of Graves & Harris. The facts pleaded in justification in Zimmerman's answer were denied by plaintiffs' replication.

The record shows that the sheep in controversy were leased by the appellants to Graves & Harris under two leases—one executed in July, 1894, and the other in October, 1896. Under the lease of July 4, 1894, Graves & Harris were to receive the sheep and to care for them, and redeliver them to the appellants in October, 1896, with one-half the increase less 15 per cent. of the original number; Graves & Harris to have one-half of the increase for the care of the sheep. It was also agreed that, if the loss of the sheep during the lease was greater than 15 per cent., Graves & Harris were to make up 85 per cent. of the original band out of other sheep of the same grade. Under this agreement, the title to the sheep, as well as the title to the increase, was to be and remain in the appellants during all the time of the lease, and until the sheep were redelivered by Graves & Harris. In October, 1895, the appellants leased another band of sheep to Graves & Har-

ris, the lease containing similar provisions as the first one. By the terms of the latter lease, Graves personally bound himself to make good any loss beyond 15 per cent. which might occur under the lease of July, 1894. Before these leases expired, in July, 1896, Graves & Harris were attached by a Great Falls bank; and, by reason of their financial difficulties, Graves & Harris, on the 2d of October, 1896, surrendered to the appellants the band of sheep they had leased in 1895. At the time of this surrender, the appellant received from Graves & Harris 58 head of sheep more than they were entitled to under the lease of 1894; but it appears that it was agreed between the appellants and Graves & Harris that the appellants should retain these 58 head to make good any loss which might be found to exist in the band of sheep leased in 1894, when a final division should be made according to the terms of lease, it being known at the time that Graves & Harris had suffered a very heavy loss of sheep under the lease of 1894. On September 12, 1896, the defendants seized 225 head of the sheep which were turned over by Graves & Harris to the appellants under the leases, and under the facts and circumstances as stated above, the seizure being made under the execution against Graves & Harris, as above referred to.

The case was tried to a jury, and a verdict rendered for the defendants, upon which a judgment was entered; and, from this judgment and an order overruling appellants' motion for a new trial, this appeal is prosecuted.

J. G. Bair and T. J. Walsh, for Appellants.

James Sulgrove, F. McIntire and J. E. Erickson, for Appellees.

PEMBERTON, C. J. At the trial of this case, the court instructed the jury to disregard all evidence offered to show justification by the defendant Zimmerman, as sheriff, under the execution issued in the case of Darcy against Graves & Harris, because there was no evidence of any judgment hav-

ing been rendered in that case upon which an execution could have legally issued. The court, notwithstanding this instruction, permitted the jury to take to their room, and consider, in making up their verdict, the summons, account, and execution in the case, over plaintiffs' objection and exception. This was error.

The court refused to give the following instruction at the request of the plaintiffs: "The evidence in this case shows that the plaintiffs, Sweeney & Cowell, were in possession of the property in question at the time the same was taken from them under the alleged execution. This is *prima facie* evidence that the plaintiffs were the owners thereof, and entitled to the possession of the same; and unless the defendants have proven by a preponderance of the evidence that Graves & Harris or Charlie Harris were the owners of or entitled to the possession thereof at the time of such taking, you should find for the plaintiffs."

The court gave an instruction to the same effect, except that the instruction given left it to the jury to say and find whether plaintiffs were in possession of the sheep at the time the sheriff seized them. There is not a particle of controversy in the evidence about this question. The evidence all shows that the sheep were at that time in the possession of the plaintiffs. The officer who made the levy so testifies. Nobody disputes it. There was therefore no question of fact upon this issue to be submitted to and determined by the jury. The instruction requested by plaintiffs should have been given to the jury.

But the main question in the case is as to whether the sheep in question were lawfully in possession of the plaintiffs at the time they were seized by the sheriff. The facts are substantially set out in the statement of the case, and it is useless to repeat them here. It is shown clearly by the testimony of plaintiff Cowell and Mr. Graves, of the firm of Graves & Harris, that the sheep were turned over to the plaintiffs under and in accordance with the terms of the leases referred to in the statement, and that the plaintiffs, under the terms of the

delivery to them of the sheep, were to keep them to make good losses which Graves & Harris were bound to make good to them under the leases of the sheep. There is some pretense that the sheep were the individual property of Harris. This could not be so. Under the lease to Graves & Harris, the title to the sheep was to remain in plaintiffs until final settlement of the sheep contracts in 1896. Harris could get no title to the sheep until then. Harris does not contradict the evidence of Cowell and Graves as to the terms of plaintiffs' possession of the sheep. We are unable to discover any grounds upon which the verdict and judgment can be sustained. Neither Graves & Harris, nor Harris individually, could have taken the sheep from the possession of the plaintiffs under any view disclosed by the facts of the case. If they could not, then their creditors could claim no greater right to do so.

The judgment and order appealed from are reversed, and the cause remanded for new trial.

Reversed and Remanded.

HUNT and PIGOTT, JJ., concur.

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JOHN AIKENS, APPELLANT, v. H. L. FRANK AND ANOTHER, RESPONDENTS.

[Submitted May 17, 1898. Decided June 13, 1898.

Foreclosure of Mechanic's Lien—Material Man—Estoppel—Appeal—Pleading—Admission—Denial.

1. A material man, as surety on the bond of a contractor, expressly contracted not to suffer liens to be placed against the owner's premises for work and material performed or furnished by the contractor, and that he would save the owner free and harmless against all loss, liens, etc. *Held*, that he was estopped to enforce a lien of his own for material furnished the contractor.
2. And the fact that certain changes were made in the plans of the building does not alter the rule, where the building contract provides that such changes may be made.
3. Where a plaintiff replied to an answer setting up an estoppel, and the case was tried

on the issues thus framed, he cannot, on appeal, depart from the lines within which he voluntarily confined himself by his pleadings below.

4. Where a plaintiff admitted a bond pleaded by defendant, his denial of its plain and specific provisions is unavailing.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by John Aikens against H. L. Frank and another. From a judgment for defendant Frank, plaintiff appeals. Affirmed.

J. A. Bender, for Appellant.

W. B. Rodgers and Charles R. Leonard, for Appellees.

HUNT, J. This action was instituted to obtain a decree of foreclosure of a mechanic's lien. Plaintiff averred that he furnished to M. J. McCune, also a defendant, material and labor for a certain building erected for and owned by the defendant Frank at Butte. Frank answered separately, and set up a contract with the defendant McCune, whereby McCune agreed to furnish the materials and to do the work described in plaintiff's complaint in consideration of the sum of $3,812, and pleaded a bond executed by said McCune, as principal, and the appellant, Aikens, and one J. F. Kelly, as sureties, to secure the faithful performance of the contract of McCune, principal contractor. The contract provided that McCune should furnish all materials for and build and complete the building involved; and that during the progress of the work Frank might make any changes he pleased in the plans without impairing the validity of the contract, the cost of such changes to be added to or deducted from the amount due the contractor. The undertaking referred to contained the following provision: "And shall not suffer any liens or incumbrances to be placed upon said building, or the land upon which it is to stand, or any part thereof, for any work or materials performed or furnished by said M. J. McCune in the performance of said contract, and shall in all respects save the said H. L. Frank free and harmless from all loss, liens, damage, de-

lays, or liability of any character by reason of the default of the said M. J. McCune in the performance of any of the provisions of said contract on his part, then the foregoing obligation to be null and void; otherwise to be and remain in full force and effect." Frank pleaded that plaintiff was estopped from claiming or enforcing a lien upon the property, and set up a counterclaim, alleging that various liens were filed upon the property which he was obliged to discharge by payment, and claiming that the contractor was guilty of certain delays, whereby, under the terms of the contract, the contractor became liable to pay certain liquidated damages. The agreement between Frank and McCune is made a part of the answer; so is the undertaking of McCune and the sureties.

The plaintiff filed a replication, in which he admitted the contract between McCune and Frank, and pleaded performance of the same. He also admitted that McCune, as principal, and himself and one Kelly, as sureties, entered into an undertaking with Frank wherein they severally undertook and bound themselves in the sum of $3,000; but averred that the conditions of such undertaking were as set forth in the replication. The plaintiff then set up the contract between Frank and McCune, yet denied that one of the conditions of the undertaking referred to was that McCune should not suffer any lien or liens to be placed upon the building, or upon the land upon which the same was to be built, for work or material furnished the said McCune, and alleged that the lien filed by himself was not filed by reason of the default of McCune in the performance of any of the provisions of the contract on the part of McCune. Plaintiff also denied that McCune delayed the completion of the building as alleged or at all. For reply to the counterclaim he set up that, in consideration of the said McCune and Kelly and plaintiff entering into said undertaking, an agreement was made by Frank to pay to McCune the sum of $3,812 for materials furnished and work done by McCune, but that Frank had not paid to McCune the said sum of money. He then pleaded that it was part of the agreement between Frank and McCune, and part

of the consideration of the bond entered into, that Frank might change or modify the plans and specifications of the building, and that the difference in cost should be added to or deducted from the amount due said McCune; and that Frank did make certain changes and modifications in the plans and specifications, and that the difference of cost to McCune was thereby greatly increased, to-wit, in the sum of $1,844.97; and that Frank refused to pay said amount, or any part thereof, to McCune. Plaintiff also averred that Frank further agreed with McCune, and as a part of the consideration for the bond entered into, that, in the event of disputes arising between the parties to the contract, the architect was appointed sole arbitrator, and his decisions were to be final, and that the architect did decide upon matters of differences between them, and found and certified to the same, and that Frank was indebted thereby to McCune in the sum of $2,012, which amount Frank refused to pay.

A jury was sworn. Plaintiff was put upon the stand, and asked if he had furnished the brick to McCune, the contractor, to build the building described in the complaint. Objection was interposed to the introduction of any evidence on the part of plaintiff tending to establish his claim to a lien on the ground that it was incompetent, irrelevant and immaterial. The court sustained the objection, and held that the plaintiff could not introduce any evidence to establish a lien, being estopped from so doing. Thereupon the defendant Frank dismissed the counterclaim pleaded in his answer without prejudice. Judgment was then rendered in favor of defendant and against the plaintiff. Exceptions were duly preserved. The plaintiff appeals from the judgment.

Plaintiff states his first contention to be that "a material man is not estopped from enforcing his lien because he is on the contractor's bond to the owner to secure him from loss on account of the default or negligence of the contractor." This may or may not be true as an independent proposition of law, but, if we grant its correctness, it cannot affect this action, or aid this appellant. This is not a case where a material man

simply became a surety against loss on account of the default of the defendant by an obligation in general terms to that effect only, but one where the plaintiff became a surety on the bond of the principal contractor, in which bond he expressly contracted not to suffer any liens to be placed upon the building or land upon which the building stood for work or materials performed or furnished by McCune under his contract with Frank, and that he would save said Frank free and harmless against all loss, liens, etc., or liability of any character, by reason of the default of McCune in the performance of any of the provisions of his contract with Frank.

If the case, as stated by appellant, were before us, the opinion of the Supreme Court of California in *Blyth* v. *Torre*, 38 Pac. 639, would be in point, as it was there held that a surety on a contractor's bond, by the terms of which the surety guaranteed that the contractor would faithfully perform the conditions of his contract, and that he would keep the owners of the building and land harmless from all liens that might be filed on account of any claims against the contractor, not exceeding a certain sum, was not estopped from enforcing a lien of his own. But it was distinctly stated by Justice Garoutte, for the court, that the bond was "simply to indemnify the owner against damage," and within such limitations the decision was reached that the necessary facts did not arise to constitute an estoppel.

So, too, *Nice* v. *Walker*, 153 Pa. St. 123, 25 Atl. 1065, cited by appellant, and followed in *Miles* v. *Coutts*, 20 Mont. 47, 49 Pac. 393, is inapplicable, for there it was held that, in order to prevent the contractor or subcontractor from filing a lien, there must be an express covenant against liens, or such a covenant resulting as a necessary implication from the language employed. If that case has any bearings at all, it is in respondent's favor, for, as before stated, the appellant here did enter into the express covenant which was lacking in the Pennsylvania decision.

In *Atlantic Coast Brewing Co.* v. *Clement*, 59 N. J. Law, 438, 36 Atl. 883, the court, upon a state of facts similar to

those in this case, sustained the contention that appellant meant to rely on by affirming the rule that it was not a defense to the suit of a contractor upon a lien claim to interpose the bond of the contractor, with provisions therein not to suffer liens to be filed, upon which bond the plaintiff and lien claimant was a surety. The doctrine of estoppel seems not to have been considered by the court; at least the decision is not based upon any reasoning considering that ground, but upon the rule that to prevent circuity of action the rights of all parties concerned should be adjusted in one suit.

But it is clear to us that plain principles of justice should bar the plaintiff in this case. Having solemnly agreed that he would not suffer any liens to be filed for materials or labor furnished to the contractor under a contract pleaded, he asks the court to be permitted to stultify himself, and to be upheld in himself doing what he agreed should not be done. The contract is clear and specific. Having made it intelligently, why should appellant not be held to it? It is an important matter to the parties concerned. Surely, it would be against good morals to allow plaintiff, after he has waived his right of lien by his contract of suretyship, to seize respondent's property for a debt due him by the contractor for whom the plaintiff stands as surety. Let him resort to action against his principal, in whose solvency or ability he must have had some degree of confidence when he executed the undertaking, agreeing that the building should be built by his principal, and that as surety he would suffer no liens to be filed against it, or the land upon which it stands. The following cases are in point: *Scheid* v. *Rapp*, 121 Pa. St. Rep. 593, 15 Atl. 652; *Trustees of the German Lutheran Church, etc.* v. *Heise & Co. et al.*, 44 Md. Opinion, 480; *Long* v. *Caffrey*, 93 Pa. St. 526; *McHenry* v. *Knickerbacker et al.*, 128 Ind. 77, 27 N. E. 430; Boisot on Mechanics' Liens, § 586; Jones on Liens, § 1501; *Spears et al.* v. *Lawrence* (Wash.) 38 Pac. 1049.

It is said that the allegations of facts constituting the estoppel were denied by operation of law. It is true that the portions of the answer setting up the estoppel did not require a

reply. Sections 720, 754, Code of Civil Procedure. But the plaintiff did reply, and the case was tried upon the issues framed by the complaint, answer, and replication. No suggestion was made to the district court by plaintiff that he desired to abandon the issues framed by the pleading, or to interpose defenses not stated by the reply filed. He thus elected to put himself in the attitude of one making material admissions of fact, and proceeding with the case upon such admissions. Under the circumstances he cannot mend his hold in the supreme court, and assert a right to go without the lines within which he voluntarily confined himself in the district court.

Plaintiff also contends that his reply raised an issue upon the extent and application of the bond. But plaintiff, having by his pleadings admitted the execution of the bond and contract set up in the answer, can gain nothing by denying that the undertaking contained one of the plain and specific provisions written within the body of the undertaking itself. There is no ambiguity in the face of the undertaking, nor are there circumstances and facts pleaded which in any way could relieve the respondent of his contract not to suffer any lien to be filed for work or materials furnished by the contractor. *Watson* v. *O'Neill*, 14 Mont. 197, 35 Pac. 1064, has no pertinency.

Nor is there any merit in the contention that the respondent, Frank, made certain changes in the plans during the progress of the work, inasmuch as the contract between McCune and Frank gave Frank the right to make such changes as he pleased. (*McHenry* v. *Knickerbacker*, *supra.*)

There being no error in the record, the judgment is affirmed.

Affirmed.

PEMBERTON, C. J., and PIGOTT, J., concur.

W. H. JOHNSON, APPELLANT, v. JOHN H. CURTIS ET AL., RESPONDENTS.

[Submitted May 11, 1898. Decided June 20, 1898.]

In an action to foreclose a mechanic's lien, it was stipulated in the court below that the only question to be tried was as to whether the plaintiff furnished the material under any contract, express or implied, made with defendants or either of them, or with any person or agent having authority to make such contract on the part of the defendants, or either of them, with the plaintiff.

There was a conflict of evidence upon this issue—which was tried to the court without a jury. *Held*, that the finding of the court below would not be reversed on appeal to the Supreme Court.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by W. H. Johnson against John H. Curtis and others. Judgment for defendants and plaintiff appeals. Affirmed.

Emmett Calahan, for Appellant.

M. L. & J. L. Wines, for Appellees.

Per Curiam. Action to foreclose a mechanic's lien. The defendants are the owners of a building in Butte, which was constructed by one Godin as contractor. H. M. Patterson was the architect. The plaintiff put some art glass in the transoms over the doors of the building during its construction by the contractor. That part of the plans and specifications for the construction of the building relating to the glass for the transoms is as follows: "The art glass transoms will be stationary. Glass for these transoms will be worth $2.50 per foot, and will be selected by the architects and owners, and paid for by the contractor." Plaintiff had read the plans and specifications, and knew of the above clause in relation to the glass for the transoms. The plaintiff filed a lien on the building in Silver Bow county for the amount of his account for putting in said glass, and brings this suit to foreclose it.

The defendants deny that plaintiff furnished and put in the

glass under any contract, express or implied, made with the defendants, or either of them, or with any agent or person authorized to contract with plaintiff therefor. The case was tried by the court without a jury. The court found in favor of the defendants, and rendered judgment in their favor. Plaintiff appeals.

The sole question as per stipulation, tried by the court below, was as to whether the plaintiff furnished the glass in controversy under any contract, express or implied, made with the defendants, or either of them, or with any person or agent having authority to make such contract on the part of defendants, or either of them, with the plaintiff. It is not disputed that the burden was on plaintiff to prove such contract to entitle him to recover in the action. Whether such contract was ever made was a question of fact. That question was tried by the district court. The most the plaintiff can claim is that there was a conflict of evidence as to this single question. We think the record shows the preponderance of evidence on the issue to be in favor of the defendants. At any rate, there is an abundance of evidence to sustain the decision of the trial court. Under such circumstances, we cannot disturb the conclusion of the trial court.

The judgment appealed from is affirmed.

Affirmed.

WILLIAM P. EMERSON ET AL., RESPONDENTS, v. DAVID BIGLER, APPELLANT.

21 200
27 488
21 200
31 522
32 591
21 200
139 279

[Submitted May 19, 1898. Decided June 20, 1898.]

Practice—Referee's Report, Filing—Review of on Motion for New Trial—Findings—Evidence—Harmless Error—Value, Evidence of.

1. PRACTICE—*Referee's Report, Filing.*—The failure of a referee to file his report within ten days after the closing of the testimony as provided in Section 1139 does not invalidate the report or the judgment rendered thereon: The section is not mandatory, but directory.

2. REFEREE'S REPORT—*Review of on Motion for New Trial.*—The defendant claimed that he moved for a non-suit at the close of plaintiff's testimony; that the motion was denied, and that defendant elected not to introduce testimony. The defendant further claimed that the plaintiff thereafter introduced evidence, and that he (plaintiff) did not waive his right to introduce evidence after the case was thus reopened. This was contradicted by the referee's report and affidavits filed by the referee. *Held*, that the ruling of the court below to the effect that defendant had made his election would not be disturbed.
3. SAME—*Held*, that defendant should have moved, when the report was filed, to have the case remanded to the referee to take further evidence.
4. FINDINGS.- The referee found as facts in the case, that a partnership had existed between the plaintiffs and defendant and that the same was dissolved, as alleged in the complaint; that the defendant had sold part of the partnership property and the value thereof and that defendant had refused to account for the proceeds; and, as conclusion of law, the referee found that plaintiffs were entitled to judgment: *Held*, that the findings were not inconsistent or defective, and that, if the defendant was not satisfied with the same, he should have filed his exceptions.
5. EVIDENCE—*Harmless Error.*—In an action between partners, the fact of partnership was not denied. *Held*, that oral testimony concerning the contents of missing letters, which was introduced for the sole purpose of proving the partnership, was not prejudicial to the rights of defendant.

Appeal from District Court, Flathead County; D. F. Smith, Judge.

Statement of the case by the justice delivering the opinion.

The complaint in this case alleges that the plaintiffs and the defendant, about June, 1893, entered into a co-partnership for the purpose of buying, selling, and raising cattle in Flathead county, and continued to transact such partnership business until July 30, 1895, when the partnership was dissolved by mutual consent. It seems that they did business without any firm name. The complaint sets forth that the defendant sold a number of cattle belonging to the partnership, and refused to account to the plaintiffs for their share of the proceeds.

The answer denies that the defendant disposed of the cattle mentioned in the complaint, and that he refused to account therefor, denies the alleged value of the cattle, and every other allegation in the complaint not admitted in the answer. The defendant alleges affirmatively that he and the plaintiffs entered into a co-partnership at the time specified in the complaint, for the purpose of buying, selling, and raising stock in Flathead county, and also for the purpose of prospecting, developing, and selling certain coal lands, described in the answer, and that he expended large sums of money in the de-

velopment of the partnership coal lands, and that the plaintiffs have refused to pay their proportions of the moneys expended in such development and improvement of the lands. Defendant alleges, also, that the plaintiffs sold a number of cattle belonging to the partnership, and appropriated to their own use the proceeds thereof.

Plaintiffs' replication denies every allegation of the answer not expressly admitted. They deny, also, that the partnership was to extend to any other business than that mentioned in the complaint, and they allege that they contributed large sums of money to the partnership business of cattle raising mentioned in the complaint. Plaintiffs asked for an accounting and a judgment for such sum as the evidence should show them to be entitled to recover against the defendant.

By order of the court, made on May 18, 1896, C. H. Foote, Esq., was appointed referee to try all issues of law and fact, and report his findings and conclusions of law in the case. On September 8, 1896, said referee commenced to hear the testimony, and continued to hear the same from day to day thereafter until the 22d day of said month, when the plaintiffs rested their case. The defendant thereupon filed his motion for a nonsuit. During the argument on the motion for a nonsuit the plaintiffs asked leave to reopen the case for the purpose of introducing other testimony, which they were permitted by the referee to do. Thereupon the argument upon the motion for a nonsuit was continued. At the conclusion of the argument the referee reports that he overruled the motion for a nonsuit, and defendant thereupon declined to offer any evidence in support of his defense, and decided to rely upon his motion for a nonsuit.

On November 19th, thereafter, the referee made and filed in the office of the clerk of the district court his report, containing his findings of fact and conclusions of law. On the 1st day of December, thereafter, the court approved the findings of fact and conclusions of law reported by the referee, and entered a judgment in accordance therewith in favor of plaintiffs. Defendant then filed a motion for a new trial,

which was overruled. From the judgment and the order overruling his motion for a new trial defendant appeals.

H. G. Swaney, for Appellant.

W. N. Noffsinger, for Respondents.

PEMBERTON, C. J. The defendant claims that the failure of the referee to file his report in court within the 10 days prescribed by Section 1139 of the Code of Civil Procedure, invalidates the report and judgment rendered thereon, and that he is consequently entitled to a new trial. We think this section is directory only, and that the failure of the referee to file his report in 10 days did not entitle the defendant to a new trial. (*Keller* v. *Sutrick*, 22 Cal. 472; *Broad* v. *Murray*, 44 Cal. 228; *McQuillan* v. *Donahue*, 49 Cal. 157.) If the defendant for any reason had desired the report filed sooner than the referee filed it, he should have applied to the court for a proper order in the premises.

The defendant assigns as a further ground for a new trial that the referee did not overrule his motion for a nonsuit when the argument thereon closed, but took it under advisement, and did not in fact rule on it until he filed his report, many days thereafter, and that he was thereby deprived of the right and opportunity to offer any evidence in support of his defense. The referee's report shows that he overruled defendant's motion when the argument thereon closed, and that the defendant thereupon declined to introduce any evidence, electing to stand entirely on his motion for a nonsuit. Affidavits of plaintiffs' witnesses are to the same effect, and show that the defendant absolutely declined to offer any evidence. It is true, affidavits of defendant's counsel are to the effect that they did not waive the right to introduce their evidence after the referee permitted plaintiffs to reopen the case pending the argument on the motion for a nonsuit. But this is positively contradicted by the report and affidavits of the plaintiffs. This question of fact was passed upon by the court on the hearing of the motion for a new trial, and we think the

showing amply supports the ruling of the court thereon. If, as defendant contends, he was deprived of this right by the action of the referee, he should have taken steps at once, when the report was filed, to have the case remanded to the referee to take his evidence. Upon a proper showing, the court would certainly have caused the referee to take and report the defendant's evidence, if he had declined to do so, as claimed by defendant. But there is no showing that defendant ever in fact offered any evidence. We think that the record shows that the defendant intended to stand, and did stand, on his motion for a nonsuit.

The defendant contends that the findings of fact of the referee are in many respects defective, inconsistent, and not supported by the evidence. The referee, in substance, finds that the partnership was created, existed, and was dissolved as alleged in the complaint, and practically admitted by the answer. He also finds that the defendant disposed of a number of cattle belonging to the partnership, the value thereof, that such disposition of the cattle was in violation of the partnership agreement, and that the defendant had refused to account for the proceeds of the sale of the cattle. As a conclusion of law, the referee reports that the plaintiffs are entitled to recover of defendant the value of the cattle. We think the evidence sufficiently supports these findings of fact, and warrants the conclusion of law reached by the referee. The finding are not inconsistent or defective. If defendant, for any reason, was dissatisfied with the findings, he should have filed his exceptions thereto, which he did not do.

The contention is made, also, that the referee erroneously admitted evidence of the contents of certain letters. It is disclosed by the record that the partnership was formed or entered into by correspondence between the parties. Some of the witnesses testified to the contents of some of these letters. The contents were permitted to be proved after the loss or destruction of the letters had been shown, for the sole purpose, seemingly, of showing a partnership. As the partnership was not denied, we cannot see that there was any neces-

sity for this proof, and, as defendant did not deny the partnership, we fail to see how he could have been injured, in any event, by the introduction of this testimony showing a partnership.

Complaint is also made that witnesses were permitted to testify to the value of the cattle who were not qualified to give such testimony. These witnesses, it is shown, knew the cattle, saw them frequently, were engaged in raising cattle, and were fully qualified, we think, from the showing, to give evidence of the value of the cattle. This question is fully discussed by this court in *Holland* v. *Huston*, 20 Mont. 84, 49 Pac. 390. There is absolutely no merit in this assignment.

There are a number of errors assigned in the record, but they are all of like character as those treated above, and it is wholly useless to discuss them in detail. We think the assignments of error are entirely without merit.

The judgment and order appealed from are affirmed.

Affirmed.

HUNT and PIGOTT, JJ., concur.

21 205 / 123 350

21 205 / 34 275

HOME BUILDING AND LOAN ASSOCIATION OF HELENA, PLAINTIFF, v. C. B. NOLAN, ATTORNEY GENERAL.

[Submitted May 6, 1898. Decided June 20, 1898.]

Building and Loan Associations—Statutes—Construction—Repeal—Constitution.

1. Sections 770 to 790 Civil Code, adopted in 1895, provided for the organization of building and loan associations. Sections 800 to 845 provided for the organization, government and regulation of such associations whose real estate loans were not confined to lands within the county in which was located the principal office of the company. The Act of March 4, 1897, is entitled: "An Act to provide for the organization, regulation and inspection of building and loan associations and to repeal Sections 770 to 845 of the Civil Code." Section 1 of the act provides for the organization of such companies. Section 2 authorizes existing building associations to avail themselves of the new law, by complying with certain conditions mentioned in that section. Section 28 repeals Sections 770 to 845 of the Civil Code. Section 25 declares that it shall be unlawful for any building and loan association to do business in this state

without having first complied with the provisions of the act—and the section contains the following proviso: "That except as to taxation, this act shall not affect any such association, heretofore organized under the laws of the state of Montana, unless it elects to come under its provisions." *Held*, first, that the act of March 4, 1897, except as to taxation, affects only such corporations as are organized thereunder, and those theretofore existing and which avail themselves of the right to come within its provisions—and that corporations theretofore existing and not electing to come within the provisions of the act, are authorized to continue under the old law, and are not affected by the provisions of the act of 1897, except those referring to taxation.

2. In construing a statute, effect must, if possible, be given to all its language; the intention of the legislature is to be ascertained; and where a general and particular provision are inconsistent, the latter will control.

3. The title of the act of March 4, 1897, is as follows: "An act to provide for the organization, regulation, etc., of building associations." No reference was made in the title to existing corporations; but the act provided that such corporations should not be affected by the law, unless they elected to come within its provisions. *Held*, that the act as to this clause was not in conflict with Sec. 23, Art. V. of the Constitution, which provides that "no bill shall——be passed containing more than one subject which shall be clearly expressed in its title."

4. *Held*, further, that the clause of the act providing that corporations theretofore existing should not be affected by its terms unless they so elected is not in conflict with Section 26, Art. V, of the Constitution, which prohibits the legislative assembly from passing (among others) any special or local laws chartering loan and trust companies.

Original proceeding in the Supreme Court by the Home Building & Loan Association of Helena against C. B. Nolan, attorney general, for a peremptory writ of prohibition. Writ granted.

F. E. Stranahan, for Plaintiff.

C. B. Nolan, Attorney General, in pro. per.

PIGOTT, J. The object of this proceeding is to obtain a peremptory writ of prohibition commanding the attorney general to desist from carrying into execution his declared intention to institute an action for the purpose of dissolving plaintiff. An alternative writ was issued, and is attacked by a motion to quash, upon the ground that the affidavit supporting it is insufficient in substance.

It appears from the affidavit that the plaintiff is a building and loan association organized as a corporation on November 18, 1895, under the laws of Montana then in force; that plaintiff "has not elected to come under the laws of 1897 relating to building and loan associations, nor has it it held any meeting of its stockholders to that end, as provided in section 2 of the act of 1897, * * * but that said plaintiff has

been at all times since the said incorporation, and now is, acting and doing its said business under the laws of the state of Montana under which it was incorporated, save and except as to taxation, as is provided in section 25 of said act of 1897; that the defendant threatens and is about to institute proceedings to dissolve plaintiff, and to have a receiver appointed to take charge of its affairs, and to procure the arrest of and to prosecute its officers for doing its business without having elected to come under the said laws of 1897," and that the sole reason therefor is the opinion of the defendant that the act of 1897 is the only law now in force governing building and loan associations; that, because of certain facts stated, irreparable injury would result to the plaintiff if the defendant is not prohibited from initiating the proceedings which he threatens to take under authority of section 18 of the act of March 4, 1897.

Following is so much of the section as is pertinent: "Should the state examiner, upon examination, find any domestic association conducting its business in whole or in part contrary to law, or failing to comply with the law, he shall so notify the board of directors of such association in writing; and if after thirty days, such illegal practices or failure continues, he shall communicate the fact to the attorney general, who shall cause proceedings to be instituted in the proper court to revoke the charter of such association."

1. The first question is, did the legislature intend by the act of March 4, 1897, to absolutely and unconditionally repeal Sections 770–845 of the Civil Code, so that the act of 1897 would be the only law in force as to building and loan associations?

Plaintiff is a domestic corporation, organized November 18, 1895. At that time two systems of law were in force providing for the organization of building and loan associations and regulating the conduct of their business. Article 1, Title 6, Part 4 of the Civil Code, containing Sections 770 to 790, was part of the original code, and provided, in terms, for the method of creating all such corporations; while Article

2, consisting of Sections 800 to 845, was an act of March 19, 1895, and provided for the organization, government, and regulation of associations whose real estate loans were not confined wholly to lands situate in the county of its principal office, and made provision, also, for the government and regulation of foreign corporations doing business in this state. It would thus seem, although the fact is unimportant in the case at bar, that, by virtue of Section 5184 of the Political Code, Article 2 restricted the operation of Article 1 to building and loan associations lending money on real estate lying in the county only in which its principal office is located. (See *Jobb* v. *Meagher County*, 20 Mont. 424, 51 Pac. 1034.) Differences of a substantial kind exist between the provisions of the two articles. It does not appear whether plaintiff was created under Article 1 or Article 2, nor is it needful to inquire, since the organization was perfected under the one or the other. Suffice it to say that until the act of March 4, 1897, the plaintiff was governed either by the provisions of Sections 770–790, or of Sections 800–845 of the Civil Code.

The act of March 4, 1897, is entitled, "An act to provide for the organization, regulation and inspection of building and loan associations and to repeal Sections 770" to "845 of the Civil Code of Montana" Sections 1 and 2 are as follows:

"Section 1. That a corporation for the purpose of raising money to be loaned among its members shall be known in this act as a 'building and loan association.' Associations organized under the laws of this state shall be known in this state as 'domestic' associations, and those organized under the laws of other states and territories as 'foreign' associations. Associations may be organized and conducted under the general laws of Montana, relating to corporations, except as otherwise provided in this act.

"Section 2. Any building and loan association heretofore organized and existing under and by virtue of the laws of the state of Montana, may be incorporated under the provisions of this act, by calling a meeting of its stockholders upon notice published in a paper having a general circulation in the

county in which the general office of the company is located, and by mailing a notice of such meeting to the last known address of its stockholders ten days previous to such meeting. Should a majority of the stock vote to become incorporated under this act, the president and secretary shall file a certificate of the vote with the secretary of state, and such companies shall thereafter act, and be incorporated under this act. The validity of its securities and contracts shall in no wise be affected by its reformation as provided in this section."

Section 17 provides that "the state examiner shall examine all building and loan associations doing business in this state and governed by this act, once a year."

Section 25 is as follows: "It shall be unlawful for any building and loan association to do business in this state without having first complied with the provisions of this act, and any association violating any of the provisions of this act, or failing to comply with any of its provisions, shall be fined not less than fifty nor more than one thousand dollars, to be recovered by an action in the name of the state, and on collection paid into the state treasury, and any officer, employe, or other person who solicits business for, aids or assists, any building and loan association to do business contrary to the provisions of this act, or without having complied with the provisions, shall be guilty of a misdemeanor, and on conviction thereof shall be fined not more than five hundred dollars or imprisoned not more than six months, or both. Such fines when collected to be paid into the state treasury: provided, that except as to taxation, this act shall not affect any such association heretofore organized under the laws of the state of Montana, unless it elects to come under its provisons."

Section 28 repeals in terms Sections 770 to 845 of the Civil Code.

In construing a statute, effect must, if possible, be given to all its language (*State* v. *Cave*, 20 Mont. 468, 52 Pac. 200), and the office of the court "is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted,

and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all'' (Section 3184, Code of Civil Procedure). The inten ion of the legislature is to be pursued, and, when a general and particular provision are inconsistent, the latter is paramount. So a particular intent will control a general one that is inconsistent with it. (Section 3135, Code of Civil Procedure.)

The question whether a repeal of a prior statute, absolute and unqualified in terms, can for any reason be limited in its operation, has frequently arisen; and the courts have uniformly held that, whenever the language of the repeal appears to have been used or intended in a limited sense, effect must be given to such intent, as in the interpretation of other statutes. "A clause in a statute purporting to repeal other statutes is subject to the same rules of interpretation as other enactments, and the intent must prevail over literal interpretation.'' (*Smith* v. *People*, 47 N. Y. 330; Bishop on Written Law, Sec. 151.) "It not infrequently happens that clauses of a law, which are in themselves clearly general in their pertinency and significance, creep into the body of some particular section of the act, and thus provoke argument as to their intended place and use. Such things often happen by the legislature tacking on amendments to provisions in original bills introduced, or by careless engrossment, or by mistake in compilation of the law for publication; but if the words are explicit, or, even if they are not, if the intention of the law may be fairly gathered from the context, it is the court's duty to collect that intention.'' (*State* v. *First District Court*, 19 Mont. 506, 507, 48 Pac. 1104.)

We are all of the opinion that the intention of the legislature was to limit the effect of the act of 1897 to corporations thereafter formed, to those theretofore created which elect to assume the burdens imposed and exercise the privileges granted by it, and to foreign corporations. Intent of the legislature must ordinarily be sought in the language of the act by which its will is voiced. Examination of the whole act in question discloses no uncertainty or ambiguity. Provision is made for

the incorporation, after June 1, 1897 (when the act took effect), of corporations of the nature of plaintiff. Permission is given by section 2 for building and loan associations organized before that time to become corporations under, and avail themselves of, its provisions by vote of the shareholders; but no command is laid upon them. The privilege of becoming incorporated under, and being governed and regulated by, the act may be exercised or not, at pleasure. By section 17, recognition is made of the fact that building and loan associations theretofore incorporated in Montana may thereafter continue to exist and lawfully transact business without being governed by, or becoming amenable to, the act. Unless it elects to take advantage of the permission given by section 2, a domestic association, organized prior to June 1, 1897, shall not, in any way, except as to taxation, be affected by the act. Such a corporation as the plaintiff is excluded from the operation of the act. The proviso quoted is broad and comprehensive. Except as to taxation, the act shall not affect the class of corporations to which the plaintiff belongs. The word "affect" is here used in the sense of operate, or act on, or concern. The proviso is a limitation extending to and qualifying the whole act, and in construing the act every section must be considered in connection with the saving clause which limits it, and read as if the clause were literally inserted. Section 28 must, therefore, be read as if the proviso were a constituent part of it, so that, as applied to the case at bar, it would appear, in effect: Sections 770 to 845 of the Civil Code are hereby repealed; provided that, except as to taxation, this section shall not affect any corporation organized under them, unless it elects to come under the provisions of this act by complying with the conditions prescribed in section 2 thereof. Indeed, the proviso is, at least, tantamount to an enactment in a separate section. The purpose, then, of the act is to make provision for the organization, regulation, and inspection of all building and loan associations, except those domestic associations theretofore incorporated which fail to come under its provisions; and to repeal sections 770 to

845, except as to the corporations taken out of the act by the proviso, and in respect of these the sections, otherwise repealed, are continued in force. The proviso was intended for the purpose of taking such corporations out of the general act, and leaving them to be governed and regulated by other laws applicable to them. From the whole act it appears that the repeal was intended to be, not absolute and unconditional, but qualified and limited by the saving clause, and plaintiff comes within the class of corporations expressly excepted, save as to taxation, by section 25 from the operation of the act. Defendant relies upon *Attorney General* v. *Borough of Anglesea*, (N. J.), 33 Atl. Rep. 971, as an authority in support of his contentions; but a reading of the opinion in that case shows that whatever was there said touching any question here raised was unnecessary to a decision.

The attorney general advances many arguments in the effort to show that the legislature intended to repeal unconditionally sections 770 to 845. He urges that if the proviso in section 25 be given effect, this condition would exist: Domestic associations, organized prior to June 1, 1897, and not electing to come under the act of 1897, which do business only in the county of their chief office, are governed by Sections 770 to 790 of the Civil Code; such associations doing business in more than one county are controlled by sections 800 to 845; while foreign associations, and all domestic associations organized after June 1, 1897, are operated under and controlled by the act of 1897. The condition so outlined may exist, and may result in some mere inconvenience, but we think the intention of the legislature is manifest from the plain language used, which is not fairly susceptible to more than one construction, and this conclusion prevents us from looking to the consequences which are likely to ensue.

While it is unnecessary, and might be improper, to express an opinion as to whether the board of building and loan commissioners, whose existence is provided for in sections 800 to 845, is abolished by the act of 1897 in question, we observe that by subdivision 5 of section 491 of "An act to amend sec-

tions 490 and 506, inclusive, being all of Article 11, of Chapter 3, Title 1, Part 3, Political Code of Montana, providing for the appointment of a state examiner, and defining his duties and powers," approved March 4, 1897, all building and loan associations are subjected to examination and supervision by the state.

It is urged that the purpose of the proviso in section 25 was to continue in force sections 770 to 845 so far only as might be necessary to sustain the existence of corporations organized thereunder, so that in all respects, save as to formation and life, the law of 1897 would control. This theory is in conflict with the clear intention disclosed by sections 2, 17 and 25, Act of 1897. In *Murphy* v. *Pacific Bank* (Cal.) 51 Pac. 317, a like contention was made in a case presenting for interpretation statutes somewhat similar to those here involved. Section 287 of the Civil Code of California prescribes the mode in which corporations then existing may make and certify their election to continue their life under the code, and proceeds: "And thereafter the corporation shall continue its existence under the provisions of this code which are applicable thereto, and shall possess all the rights and powers and be subject to all the obligations, restrictions and limitations prescribed thereby." Section 288 provides: "No corporations formed or existing before twelve o'clock, noon, of the day upon which this code takes effect, is affected by the provisions of part 4, of division 1, of this code, unless such corporation elects to continue its existence under it as provided in section 287; but the laws under which such corporations were formed and exist are applicable to all such corporations, and are repealed subject to the provisions of this section." The court say: "The distinction here made between those corporations which should elect to come under the code provisions and those that did not is clearly manifest. If no such distinction was intended, it would have been quite sufficient to say that no corporation should cease to exist because of the adoption of the code, but thereafter all corporations existing at the time the code takes effect shall be governed by its provisions alone, and there

would have been in that case no necessity or propriety for an election on the part of the corporation to come under its provisions. This construction is supported by *Robinson* v. *Southern Pacific Railway Co.*, 105 Cal. 549, 550, 38 Pac. 94, 722, though the question was not fully considered.'' It would seem that the opinion in *Estate of Eastman*, 60 Cal. 308, tends to the same conclusion. We express no opinion upon the result reached in the case from which the quotation is made, but refer to the reasoning as illustrating the views entertained by a respectable court with respect to statutes bearing a resemblance to, but more difficult of construction than, those presented to us in the case at bar. The scope of the words, ' the laws under which such corporations were formed and exist are applicable to all such corporations,'' would seem to be the chief feature, distinguishing upon principle the question in *Murphy* v. *Pacific Bank* from the one involved in this proceeding and just considered.

2. The proviso is assailed as being repugnant to Section 23, Article 5, of the Constitution of Montana, providing that ''no bill * * * shall be passed containing more than one subject which shall be clearly expressed in its title; but if any subject shall be expressed in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed.'' Its validity is also questioned because of section 26 of article 5: ''The legislative assembly shall not pass any local or special laws in any of the following enumerated cases, that is to say, chartering * * * loan and trust companies. In all other cases where a general law can be made applicable, no special law shall be enacted.''

Neither objection is well urged. The title of the act of 1897 makes no specific reference to corporations then existing, but the omission is not fatal to the proviso. The act is a general revision of the laws relating to the one subject embraced therein, and its title is ''An act to provide for the organization, regulation and inspection of building and loan associations, and to repeal sections 770 to 845.'' It declares that

domestic building and loan associations theretofore incorporated shall (except as to taxation) be governed and regulated thereby only in the event such associations shall elect to come under its provisions. It expressly excludes from its operation corporations in the situation of plaintiff; they are not affected by the act. The objection is clearly bad, within the principles announced in *Hotchkiss* v. *Marion*, 12 Mont. 218, 29 Pac. 821; *Jobb* v. *Meagher Co.*, 20 Mont. 436, 51 Pac. 1034. See, also, *In re Ryan*, 20 Mont. 64, 50 Pac. 129.

The second objection is without merit. The proviso is neither local nor special, nor does it purport to charter an association. It is general in its terms, and operates alike upon all corporations of the class which it was intended to, and does, except out of the act. This is so obvious that argument is not required. We make the following citations, however, in support of our conclusion: *State* v. *Long*, 21 Mont. 26, 52 Pac. 645. Thompson on Corporations, Sec. 586; *Ex parte Smith et al*, 38 Cal. 702; *Hazelett* v. *Butler University*, 84 Ind. 230; *Hymes* v. *Aydelott*, 26 Ind. 431; *McAunich* v. *Railway Co.*, 20 Iowa, 338; *Van Riper* v. *Parsons*, 40 N. J. Law, 123; *Reading* v. *Savage*, 124 Pa. St. 336, 16 Atl. 788; *Chicago Ry. Co.* v. *Iowa*, 94 U. S. 163; *Welker* v. *Potter*, 18 Ohio St. 85; *State* v. *Pond*, 93 Mo. 607, 6 S. W. 469. While no one of them in its facts may be directly in point, each recognizes or declares some rule of interpretation properly applicable to these sections of our constitution.

The motion to quash is denied. Defendant refuses to further plead. It is therefore ordered that a peremptory writ of prohibition issue out of the office of the clerk of this court, as prayed.

Writ granted.

PEMBERTON, C. J., and HUNT, J., concur.

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STATE OF MONTANA, EX REL. WILLIAM R. KENYON, RELATOR, v. E. J. LAURANDEAU, JUSTICE OF THE PEACE, ETC., RESPONDENT.

[Submitted May 4, 1898. Decided May 23, 1898.]

Justices of the Peace—Jurisdiction.

1. The docket of a Justice of the Peace must show affirmatively all the facts necessary to confer jurisdiction.
2. Under Section 1621, a Justice of the Peace cannot enter a judgment in favor of the plaintiff, where he fails to appear at the time specified in the summons or within one hour thereafter.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

Certiorari by the state Montana, on the relation of William R. Kenyon, against E. J. Laurandeau, as justice of the peace in and for Silver Bow township, Silver Bow county, Montana. From a judgment for plaintiff, defendant appeals. Affirmed.

Statement of the case by the justice delivering the opinion.

The record and the application for a writ of *certiorari* in this case show that one Joseph Milano commenced an action before M. L. Holland, a justice of the peace in Silver Bow county, on the 27th day of October, 1896, against J. Ross Clark, W. A. Clark, M. J. Connell, and the relator, W. R. Kenyon, as co-partners doing business under the firm name of J. Ross Clark & Co., to recover upon a partnership liability for rents of a certain building claimed by the plaintiff in the action. The summons issued in said action was served on W. A. Clark and the relator, and made returnable on the 2d day of November, 1896, at 10 o'clock a. m. On the return day of the summons, W. A. and J. Ross Clark appeared by counsel, and filed a general denial to the complaint. The relator did not appear. The justice's docket contains this entry:

"November 5, 1896. The legal time for answering having expired, and there being no answer or appearance on the part of the defendant W. R. Kenyon, the default of the said W. R. Kenyon is entered, for want of an answer or appearance." The justice's docket also contains this entry: "November 7. W. F. Cobban called, sworn, and examined as to default of W. R. Kenyon, whereupon the court orders and adjudges that the plaintiff do have and recover of the defendant W. R. Kenyon the sum of $120, and costs of this action, taxed at $13.00."

The case as to the Clarks was continued from time to time, as shown by the docket, by stipulation, until the 21st day of December thereafter, when the plaintiff dismissed the action as to them. On December 19th this relator filed a motion in the justice's court to set aside the judgment by default entered against him as shown above. This motion was denied on the 24th day of December. On the 12th day of January, 1897, the relator filed his application in the district court of Silver Bow county for a writ of *certiorari* directed to the justice of the peace, requiring him to make return of his proceedings in the above-entitled cause. The justice thereafter filed his return to said writ, and at the same time filed a motion to dissolve the same. Upon the hearing of said motion to dissolve, and after considering the merits of the case as shown by the application and return of the justice of the peace, the district court overruled the motion, and entered judgment annulling and setting aside the judgment entered in said cause by the justice. E. J. Laurandeau is the successor in office, as justice of the peace, of M. L. Holland. The defendant appeals from the judgment of the district court.

John A. Shelton, for Appellant.

Forbis & Evans, for Respondent.

PEMBERTON, C. J. The question presented, and the only one we will discuss, is as to whether—as shown by the above statement—the justice had jurisdiction to render the judgment complained of by the relator.

The justice's docket does not show that plaintiff appeared at the time specified in the summons, or within one hour thereafter. In such case, Subdivision 2, Section 1621, Code of Civil Procedure, provides the justice may enter judgment dismissing the case without prejudice to a new action, and for costs. The docket of the justice must affirmatively show that the plaintiff was present at such time, in order to give the justice jurisdiction to enter judgment against a defaulting defendant. It is not contended that the relator was present when judgment was rendered against him.

The statute of Nebraska upon the question here involved is as follows: "Section 6438 (Sec. 916). The parties are entitled to one hour in which to appear. after the time mentioned in the summons for appearance, but are not bound to remain longer than that time, unless both parties have appeared, and the justice being present, is engaged in the trial of another cause. In such case, the justice may postpone the time of appearance until the close of such trial." (Comp. St. Neb. 1895.)

Construing that statute, the supreme court of that state said in *Miller* v. *Plue*, 64 N. W. 232: "By section 916 of the code, the parties to a suit in a justice court are given one hour in which to appear, after the time named in the summons for appearance; and, unless the plaintiff appears within the hour, jurisdiction is lost, where the defendant makes default. So far as the justice's docket discloses, the case may have been called and judgment rendered before the hour mentioned in the summons, or several hours thereafter. The omission of the justice to state in his docket the hour for the appearance of the defendant, and the time when the case was called for trial, are jurisdictional defects, and render the judgment void. (*Mudge* v. *Yaples* (Mich.) 25 N. W. 297; *Post* v. *Harper* (Mich.) 28 N. W. 161.) The doctrine of presumptions in favor of the regularity of the proceedings of courts of general jurisdiction does not apply to courts of inferior and limited jurisdiction, but as to such courts the facts necessary to give jurisdiction must fairly appear from the record."

This Nebraska section does not provide, like our statute, that the justice may dismiss the action if the plaintiff fails to appear at the time named in the summons, or within one hour thereafter, but it gives each party one hour after the hour named in the summons to appear; and the court holds that, unless the justice's docket affirmatively shows that the plaintiff did appear within such time, the justice has no jurisdiction to enter judgment against a defendant who has not appeared.

The statute of Michigan provides that, if the plaintiff fails to appear within one hour after the time specified in the summons, the justice shall enter judgment of nonsuit against him.

In *Redman* v. *White*, 25 Mich. 523, interpreting this statute, the supreme court of that state said: "The failure of the plaintiff to appear within one hour after process is returnable works a discontinuance, and, of course, excludes all authority in the justice to give judgment for him. Now, if the proof afforded by the docket was so defective as not to show that the plaintiff appeared on any particular day out of several, it certainly did not show that he appeared within the time prescribed, to authorize the justice to render judgment for him. It therefore fails to show affirmatively, as is necessary, that the justice was possessed of authority to give the judgment in question, and was properly excluded."

In *Mudge* v. *Yaples* 25 N. W. 297, (Mich.) involving the same Michigan statute, the court says: "The appearance of the plaintiff within one hour of the time named on the return day of the summons must be affirmatively shown, when there is no appearance of the defendant, or jurisdiction is lost." The court also holds that this fact must be shown by the docket of the justice.

In *Brady* v. *Taber*, 29 Mich. 199, a trial was commenced before a justice. Witnesses were sworn on one day, and the cause, not being completed, was continued and held open until a succeeding day at 1 p. m. On the day to which the case was continued the justice's docket showed that neither party appeared, and that the justice thereupon entered judgment for the plaintiff. The court held the judgment void, saying: "The

failure of the plaintiff to appear on the adjourned day operated as a discontinuance of the suit, and deprived the justice of all jurisdiction to render judgment against the defendant, or any judgment except that of nonsuit and for costs." (See, also, *Brown* v. *Carroll*, 16 R. I. 608, 18 Atl. 283; *Gaunt* v. *Perkins*, 8 Or. 355.)

The authorities proceed upon the theory that, if the plaintiff in a suit before a justice expects to obtain a judgment, it is his duty to appear and prosecute his case. If the defendant must appear to prevent judgment, why not require the plaintiff to appear also in order to obtain relief. We think the plaintiff has no right to make default himself, by not appearing, and depend upon the justice to take care of his case. The justice has no right to practice law before himself, as he would have to do if he must look after the interests of a non-appearing plaintiff.

We think that, as in this case, where both parties failed to appear within the time fixed by the statute, the justice lost jurisdiction for all purposes except to do what the statute provides he may do in such event, namely, dismiss the case without prejudice to another suit. The justice could only do what the statute says he may do. He has no implied power or jurisdiction. He must follow the statutory direction or permission. If he could, in the absence of plaintiff, enter the default of the defendant, and continue the case to a future day to hear evidence, and render final judgment, as he did in this case, why could he not, in the absence of both parties, have called a jury, sworn and examined plaintiff's witnesses, and rendered judgment against the absent defendant on the return day of summons? We think it plain that a justice has no such power. In the event of both parties failing to appear at the time specified by law, the justice must look to the statute to see what he may do. In such event the statute says he may dismiss the suit without prejudice. He is given no other authority, either expressly or by implication, in such case.

We do not hold, nor is it necessary to a determination of

this case to hold, that if it should appear that plaintiff was prevented from appearing by sickness on the return day of the summons within the time required by law, or if on that day the justice should be sick or engaged in the trial of another cause, or if some other good reason should exist, the justice would lose jurisdiction by postponing the cause. But, as it is necessary that the justice's docket should show affirmatively all the facts and things necessary to confer jurisdiction, so it should show these facts, also, in order to preserve jurisdiction. None of these facts are shown by the docket in this case, nor is there any pretense that any such fact or facts existed. Jurisdiction can only be shown by the docket itself, as is held by the authorities cited above.

We are therefore of the opinion that the judgment of the justice involved in this proceeding was void for want of jurisdiction in the justice to render it. This conclusion renders it useless to treat other questions presented by the record.

The judgment appealed from is affirmed.

Affirmed.

HUNT and PIGOTT, JJ., concur.

STATE OF MONTANA EX REL. C. B. NOLAN, ATTORNEY GENERAL, PLAINTIFF, v. THE MONTANA RAILWAY CO. AND THE BUTTE, ANACONDA & PACIFIC RAILWAY CO., DEFENDANTS.

[Submitted June 7, 1898. Decided June 20, 1898.]

Railroads—Power to Lease—Consolidation of—Parallel and Competing Roads.

1. One railroad company cannot lease its road to another company unless the legislature has given it power so to do.
2. Section 923 of the Civil Code (Act of March 4, 1893,) which was continued in force after the adoption of the Code by Section 5186 Political Code, repeals Sections 911 and 912, so far as these latter sections limit the right of railroad companies to lease their roads to one another to such companies as are not parallel or competing roads.

3. Under Section 923 of the Civil Code, one railroad company can lease its road to a parallel and competing road for a term of ten years. Such a lease is not a consolidation of the two roads, within the meaning of Section 6, Article 15 of the State Constitution.
4. *Held*, by a majority of the Court, that although two railroad companies have but one common terminus, nevertheless, when by traffic arrangement with other roads they are brought into competition between common terminal points, they are competing roads within the meaning of Section 6, Article 15 of the Constitution.

ORIGINAL PROCEEDING by the State of Montana, at the relation of C. B. Nolan, attorney general, against the Montana Railway Company and the Butte, Anaconda & Pacific Railway Company, corporations. Petition denied.

C. B. Nolan, Attorney General, for the State.

Citing Section 6, Article 15, of the State Constitution; Sections 912 and 923, Civil Code; Beach on Railways, Section 535; *State* v. *Atchison Railway Co.*, 24 Neb. 143; *Langdon* v. *Branch*, 37 Fed. 463.

W. W. Dixon, *William Scallon* and *William H. De Witt*, for Defendants.

(After citing other cases and statutes.) Therefore we enter upon the main discussion of this case with the preliminary proposition established that section 923 is the law applicable to the subject, and gives to the Montana Railway Company and the Butte, Anaconda & Pacific Railway Company the right to enter into this lease. This is a direct legislative authority granting the power to make the lease, and meets the decisions in the cases which hold that such power must be granted by statute. (*Louisville & Nashville Ry. Co.* v. *Kentucky*, 116 U. S. 692; 75th Texas, 434; *St. Louis, V. & T. H. R. Co.* v. *Terre Haute*, 145 U. S. 393; *Thomas* v. *Ry. Co.*, 101 U. S. 71; *Penn. Co.* v. *Ry. Co.*, 118 U. S. 290; *O. R. & N.* v. *Ry. Co.*, 130 U. S. 1; *Cent. Tp. Co.* v. *Car Co.*, 139 U. S. 24, 45, 54; *St. Louis Co.* v. *Ry. Co.*, 145 U. S. 395, 402; *L. & N. Co.* v. *Kentucky*, 161 U. S. 677; Rees on Ultra Vires, § 137; 1 Stimson's Am. St. Law, § 467, p. 107. Counsel also contended "that a 'leasing' is not a 'consolida-

tion' and is not included in that term," citing *Louisville & N. R. Co.* v. *Kentucky*, 161 U. S. 690; *Gere* v. *N. Y. Central & Hudson River R. R. Co.*, 19 Abbott's New Cases, 202; *Mills* v. *Central R. R. Co.*, 41 N. J. Eq. 1; *Mackintosh* v. *Flint, etc., R. R. Co.*, 34 Fed. 582; Hirschl on Corporations, p. 40; *Elkins* v. *Camden & Atlantic R. R. Co.*, 36 N. J. Eq. 1; *Board of Coms.* v. *R. R. Co.*, 50 Ind. 110; Thompson on Corporations, § 5891; 3 Amer. and Eng. Enc. of Law, p. 825; *St. L. V. & T. H. R. Co.* v. *The Terre Haute & Ind. R. Co.*, 145 U. S. 393; *Archer* v. *Railway Co.*, 102 Ill. 493; *Pa. etc. Co.* v. *Ry. Co.*, 118 U. S. 290.) The question of what is a competing line has been the subject of consideration in quite a number of decided cases, in jurisdictions where the question is an open one; for in some states the constitution itself declares that the question is one for the jury, as in Pennsylvania, Missouri and Arkansas. (1 Stimson's Am. St. Law, § 467, p. 108.) But in the case at bar the court is the jury, as all the facts are admitted. But it is, in nearly all, if not all, cases, treated as a question of fact; and in some cases it has been held to be a fact of which the court will take judicial notice from the geographical situation. (*Ry. Co.* v. *State*, 10 S. W. 81, 83 (Tex.); *Ry. Co.* v. *Ry. Co.*, 35 Atl. 952 (Penn.); *Hager* v. *Ry. Co.*, 4 O. D. L. 487, 29 Wkly L. B. 68 (Ohio); *Kimball* v. *Ry. Co.* 46 Fed. 888; 6 Am. and Eng. Enc. Law (2nd Ed.), p. 826; *State* v. *Vanderbilt*, 37 O. St. 590; 8 Am. and Eng. Ry. Cas. 657; *L. & N. Ry. Co.* v. *Kentucky*, 161 U. S. 677, 691; *Gulf, etc.* v. *State*, 10 S. W. (Tex.) 81, 83, distinguishing it from the case of *Railway Co.* v. *Rushing*, 69 Tex. 506, 6 S. W. 834; *Cumberland, etc., Ry.* v. *Gettysburg, etc., Ry. Co.*, 35 Atl. 952; *Kimball* v. *Ry. Co.*, 46 Fed. 888; *Louisville & Nashville Ry.* v. *Kentucky*, 161 U. S. 677.)

HUNT, J. The attorney general has instituted this proceeding as an original one in this court, to have declared invalid and of no force and effect a certain contract of lease entered into between the Montana Railway Company and the

Butte, Anaconda & Pacific Railway Company. Both of these ralroad corporations are organized under the laws of this state, and operate railroads within Montana. The terms of the lease are substantially as follows: The Montana Railway Company leases to the Butte, Anaconda & Pacific Railway Company all the railway, including lands, right of way, buildings, tracks, turntables, yards, and all real property pertaining thereto lying between Stuart Junction and Anaconda, in the county of Deer Lodge. The lease is to commence May 1, 1898, and to run ten years. The Butte, Anaconda & Pacific Railway Company agrees to pay to the Montana Railway Company an annual rental of $25,000 in monthly installments. The Butte, Anaconda & Pacific Railway company covenants to keep the leased premises, including the tracks and all property pertaining thereto, in as good condition as the same were at the time the lease became effective. It is provided that the leased property shall at all times be operated by the Butte, Anaconda & Pacific Company in accordance with its charter and the laws, and all responsibilities of such operation shall be assumed by the lessee. The Montana Railway Company and the Northern Pacific Railway Company are to be at all times held harmless by the lessee for all acts or omissions that may occur in the operation of said property, except when the Northern Pacific Railway Company runs its own trains over the track of the Montana Railway Company, in which case the lessee is not to be responsible for accidents unless due to the defective track or negligence of the employees of the lessee. The Butte, Anaconda & Pacific Company covenants to pay all expenses of operation and maintenance of the leased property, and all taxes and assessments during the period of the lease. The Butte, Anaconda & Pacific company further covenants that the business of the Oregon Short Line Company, between Anaconda and all points reached by said Short Line, or by way of the same, shall at all times be handled upon as favorable terms as are accorded to any other line, and that no discrimination shall be made against the business of the Oregon Short Line, either in facilities accorded to it or the rates charged it, as compared

with any other line doing business in Anaconda which passes over the Butte, Anaconda & Pacific tracks. All freight business to and from points east of Butte reached by the Northern Pacific Railway destined to or from Anaconda is to be interchanged at Butte between the Northern Pacific Railway Company and the Butte, Anaconda & Pacific Railway Company, and the division of the revenues shall at no time during the continuance of the lease exceed the Butte, Anaconda & Pacific Company's divisions now effective between the Butte, Anaconda & Pacific Company and the Montana Central Railway Company, and shall at all times be as favorable to the Northern Pacific as to the Montana Central or Great Northern Railway Companies. The Northern Pacific is to have the right to run passenger trains to and from points east of Butte over the leased line between Stuart and Anaconda. Upon all joint business handled upon such trains the revenues shall be divided, and the division allotted the Butte, Anaconda & Pacific Company upon competitive business shall be the local fares of the Butte, Anaconda & Pacific Company from Butte to Anaconda, and upon noncompetitive business shall be the local fares from Stuart to Anaconda, as the same may be established from time to time, but at no time in excess of those existing at the time this lease becomes effective. The Butte, Anaconda & Pacific Company shall be entitled to receive all the local passenger fares received or collected on such Northern Pacific trains upon such leased line, or for tickets or passenger fares thereon between Butte and Anaconda. In consideration therefor no charge is to be made by the Butte, Anaconda & Pacific company for the use of the leased tracks, or the facilities for the passenger business from Stuart to Anaconda, except the fares of passengers as provided in the lease. Upon all joint freight business to and from stations upon the Northern Pacific Railroad or its connections west of Helena, Mont., to be interchanged at Stuart, the Butte, Anaconda & Pacific shall be allowed on carload freight $3.50 per carload, and upon less than carload 3 cents per 100 pounds; and upon passenger business its local fare, but not at any time in excess

of 45 cents per passenger. The lease provides against discrimination against the business of the Montana Union or Northern Pacific Companies, interchanged with the Butte, Anaconda & Pacific Company at Butte or Stuart, or other points of connection, as compared with any other exchange of business existing between the Butte, Anaconda & Pacific Company and any other lines at the same or competing points. It is also agreed by the Northern Pacific that freight, passenger and express rates between its eastern and western terminals and connections and Anaconda shall at all times be no higher than the rates between the same points and Butte, including the divisions agreed upon in the lease, or those allowed the Butte, Anaconda & Pacific Company by other competing lines. Provision is also made for an allowance in case the Northern Pacific should handle passenger or express traffic between Butte, Stuart and Anaconda over the leased premises for its competitors or any other railroads. The lessee is to receive all revenue and pay for all mails carried between Stuart and Anaconda on Northern Pacific trains. The lease contains provisions whereby, if the lessee fails to perform the covenants or obligations of the contract, the lessor may, at its option, terminate the lease, and repossess itself of the leased premises. The contract is also binding upon the successors and assigns of the party bound, and shall inure to the successors and assigns of the party for whose benefit it is made.

The pleadings and stipulations show the following facts: The Montana Union Railroad Company, the Montana Railway Company, and the Butte, Anaconda & Pacific Railway Company are separate corporations, but the stock of the Montana Union and of the Montana Railway Company is controlled by the Northern Pacific Railway Company. The Butte, Anaconda & Pacific line starts from Butte, and runs to the city of Anaconda. For fourteen miles after leaving Butte its course is south; then it runs northwesterly about twelve miles to Anaconda. The Montana Union runs from Butte to Garrison, a station on the Northern Pacific main line. It practically parallels the Butte, Anaconda & Pacific for a distance of fourteen

miles; that is to say, from Butte towards Anaconda the lines are parallel for a distance of fourteen miles. About three miles north of where the lines of the Montana Union and the Butte, Anaconda & Pacific diverge is the station of Stuart, on the main line of the Montana Union. The Montana Railway Company's line runs from Stuart to Anaconda in a north-north-northwesterly direction. The Montana Railway and the Butte, Anaconda & Pacific have one common terminus—the city of Anaconda. Their other termini are Stuart, for the Montana Railway Co., and Butte, for the Butte, Anaconda & Pacific. Stuart, a terminus of the Montana Railway Company, is from two and a half to three miles from the nearest point on the Butte, Anaconda & Pacific line. For several months prior to May 1, 1898, the Montana Railway was temporarily operated by the Northern Pacific, but on May 1st it leased its line between Anaconda and Stuart to the Butte, Anaconda & Pacific Company, as heretofore stated.

It is admitted that the Montana Railway and the Butte, Anaconda & Pacific lines are connected at Anaconda, and that the shortest route from the city of Butte via Anaconda to Stuart, and stations on the Montana Union Railroad north of Stuart, and all stations on the Northern Pacific main line, is by way of the Butte, Anaconda & Pacific to Anaconda, and from Anaconda to Stuart by the Montana Railway, and from Stuart northerly on the Montana Union to points along the lines of the Montana Union and Northern Pacific. It is also admitted that the Butte, Anaconda & Pacific Company each day runs continuous trains over the route just described, and intends to continue to run such trains.

The proposition advanced by the attorney general is that the Butte, Anaconda & Pacific Railway and the Montana Railway lines are parallel and competing, and that for that reason the lease of the Montana Railway to the Butte, Anaconda & Pacific Company is prohibited by the constitution, and *ultra vires* of the corporation. On the other hand the defendants insist—first, that the facts establish that the above-mentioned lines of railway are not parallel or competing, and are con-

tinuous and connected; second, that, if the proposition just stated is not tenable, still the lease is valid, and but the exercise of the powers granted to the aforesaid corporations by the laws of Montana under which they are organized, and not in conflict with the constitution.

It can be safely stated that, unless the legislature has given to the corporations here interested the right to lease, the power does not exist. This principle is now firmly established by the Supreme Court of the United States, having been laid down by Justice Miller, for the court, in *Thomas v. Railroad Co.*, 101 U. S. 71, in the following words: "We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such and such only, as those statutes confer. Conceding the rule applicable to all statutes—that what is fairly implied is as much granted as what is expressed—it remains that a charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others." We are, therefore, brought to inquire where the consent is to be found. In considering this question, it becomes necessary to examine the constitution of the state and the statutes, and then to observe their relation to the general subject under consideration, and to one another.

Cutting out of the controlling constitutional provision language not material to railroad corporations, we have the following clause: "No railroad corporation, or the lessees or managers thereof, shall consolidate its stock, property or franchise, with any other railroad corporation, owning or having under its control a parallel or competing line; neither shall it in any manner unite its business or earnings with the business or earnings of any other railroad corporation, nor shall any officer of such railroad company act as an officer of any other railroad company owning or having control of a parallel or competing line. (Article XV, Sec. 6, Constitution of Montana.)

Turning to the statutes, we find that the legislature adopted

Sections 911, 912, and 913 of the Civil Code at the time of the adoption of the codes.

Section 911 authorizes any two or more railroad corporations whose respective lines not being parallel or competing lines, are wholly or partly within this state, when their respective lines of road, or any branch thereof, so connect within this state that they may operate together as one property, to consolidate their capital stock, franchises and property, and thereby to become one corporation by any name adopted, which may be that of one of them, upon such terms and conditions as may be agreed upon by the corporations in the manner provided by the statutes.

Section 912 provides that any railroad corporation whose line is wholly or partly within Montana, or reaches the boundary lines thereof, whether organized under the laws of Montana or of the United States, or of any other state or territory, may lease or purchase the whole or any part of the railroad or line of railroad of any railroad corporation, together with all the rights, powers, immunities, franchises, etc., provided the railroad or line of railroad so leased or purchased is continuous or connected with its own line, and not a parallel or competing line.

Section 913 provides that any railroad corporation organized as in the preceding sections shall have authority to negotiate and deliver its bonds, securities, or obligations, and negotiate the same in such manner as the board of directors may authorize or determine, and to secure the payment of such bonds the corporation may execute and deliver such mortgages or deeds of trust upon all or any part of its property as the directors may determine; and, if any such mortgage shall so provide, it shall be and remain a valid lien upon the property of the corporation irrespective of the law relating to chattel mortgages, and such mortgage shall be taken, held, and enforced as are mortgages of real estate.

The foregoing statutes intended to give, and did give— first, a complete power of consolidation, by which a corporation formed by a consolidation should be a corporation suc-

ceeding to and having, owning, and exercising all the powers, rights, franchises, and immunites possessed by the corporations consolidated into one, provided the consolidating corporations were not parallel or competing; second, an equally adequate power, whereby one railroad corporation could lease or purchase the whole or any part of another railroad corporation's property, together with its rights and franchises, provided the leased or purchased railroad was continuous or connected with its own line, and was not parallel or competing; third, a further general power to any railroad corporation to issue bonds and mortgage its property. If the statutes just cited were in force and were the only ones in force, the questions necessary to be determined in this case would be simply whether or not the Montana Railway is continuous or connected with the Butte, Anaconda & Pacific, and whether the Butte, Anaconda & Pacific and the Montana railways are competing and parallel. If those questions were answered affirmatively, clearly the power necessary to authorize the lease under examination is denied by the inhibitory language of the constitution.

But we must go further, and consider another section of the statutes. By an act approved March 4, 1893, (Third Session Laws, p. 157) and especially preserved and continued in force by Section 5186 of the Political Code, approved March 13, 1895, the legislature provided as follows: "Any railroad company now or hereafter incorporated pursuant to the laws of this state or of the United States, or of any state or territory of the United States, may at any time by means of subscription to the capital stock of any other railroad company, or by the purchase of its stock or bonds, or by guaranteeing its bonds, or otherwise, aid such company in the construction of its railroad within or without this state; and any company owning or operating a railroad within this state may extend the same into any other state or territory, and may build, buy, lease, or may consolidate with any railroad or railroads in such other state or territory, or with any other railroad in this state, and may operate the same, and may own such real

estate and other property in such other state or territory as may be necessary or convenient in the operation of such road; or any railroad company may sell or lease the whole or any part of its railroad or branches within this state, constructed or to be constructed, together with all property and rights, privileges and franchises pertaining thereto, to any railroad company organized or existing pursuant to the laws of the United States, or of this state, or of any other state or territory of the United States; or any railroad company incorporated or existing under the laws of the United States, or of any state or territory of the United States, may extend, construct, maintain and operate its railroad, or any portion or branch thereof, into and through this state, and may build branches from any point, or such extension to any place or places within this state; and the railroad company of any other state or territory of the United States which shall so purchase or lease a railroad, or any part thereof in this state, or shall extend or construct its road or any portion or branch thereof in this state, shall possess and may exercise and enjoy, as to the control, management and operation of the said road, and as to the location, construction and operation of any extension or branch thereof, all the rights, powers, privileges and franchises possessed by railroad corporations organized under the laws of this state, including the exercise of the power of eminent domain. Such purchase, sale, consolidation with, or lease may be made, or such aid furnished upon such terms or conditions as may be agreed upon by the directors or trustees of the respective companies; but the same shall be approved or ratified by persons holding or representing a majority in amount of the capital stock of each of such companies, respectively, at any annual stockholders' meeting or at a special meeting of the stockholders called for that purpose, or by approval in writing of a majority in interest of the stockholders of each company respectively; provided that nothing in the foregoing provisions shall be held or construed as curtailing the right of this state, or the counties through which any such road or roads may be located, to levy and col-

lect taxes upon the same and upon the rolling stock thereof, in conformity with the provisions of the laws of this state upon that subject; and all roads or branches thereof in this state, so consolidated with, purchased or leased, or aided and extended into the state, shall be subject to taxation and to regulation and control by the laws of this state, in all respects the same as if constructed by corporations organized under the laws of this state; and any corporation of another state or territory, or of the United States, being the purchaser or lessee of a railroad within this state, or extending its railroad or any portion thereof into or through this state, shall establish and maintain an office or offices in this state at some point or points on its line at which legal process and notice may be served, as upon railroad corporations of this state; provided further, that before any railroad corporation organized under the laws of any other state or territory of the United States shall be permitted to avail itself of the benefits of this act, such corporation shall file with the secretary of state a true copy of its charter or articles of incorporation. (Section 923, Civil Code.)

There are manifest and numerous irreconcilable inconsistencies between this last section quoted and sections 911 and 912. Although all three statutes refer to the general subject of consolidation, purchasing, and leasing of railroads by other railroad corporations, the method of procedure to effect a consolidation is different, and restrictions expressly included within the provisions of sections 911 and 912, not necessary to be here set forth in detail, are not found in section 923. But, as more conspicuous than other differences, it is noticeable that in 923 the right to consolidate, lease, or buy is granted without regard to whether or not the railroads owned by the contracting parties are parallel or competing, or continuous or connected. The later statute was a radical departure from a previous legislative policy. It may be this departure arose by reason of considerations which led the legislature to believe that principles of public policy do not invalidate reasonable traffic arrangements between lines of railway

whereby one railroad corporation may lease for a reasonable period of time an independently incorporated short line, which is a spur or feeder of still another and more important line; and that on this account they were led to authorize in express terms such agreements, even though the leased line is a link which by its connections becomes a competing line. They had a right, subject to the limitations of the constitution, to adopt a policy less restricted than that which had been recommended by the code commissioners, or established by their own action just previously taken; and it is not for the court to determine the wisdom of a policy underlying laws which have resulted from changed opinions of the lawmaking body. It is far more likely, however, that the peculiar condition presented really arose by the difference of views between the code commissioners who reported the Civil Code in 1892 and the several legislatures which met after the report of that commission, and before the adoption of the Codes as reported. It appears that sections 555 and 556 of the Civil Code, as reported by the code commission, were adopted February 19, 1895, when the Civil Code was adopted, as sections 911 and 912 of that Code. The legislature, for convenience sake, passed the whole Code substantially as reported, and then proceeded to amend or revise the Code as passed. But between the time of the report of the code commission and the adoption of the Codes, the legislative session of 1893 occurred, and it was then that section 923 was enacted. Thereafter came the session of 1895, whereat a preserving act (Political Code, Section 5186) was passed after the adoption of the Codes. This preserving act specially continued in force section 923. Applying now the rules of construction laid down in the case of *State* v. *Rotwitt*, 17 Mont. 41, 41 Pac. 1004; *Steele* v. *Gilpatrick*, 18 Mont. 453, 45 Pac. 1089; *Proctor* v. *Cascade Co.*, 20 Mont. 315, 50 Pac. 1017--it is our opinion that the intent of the legislature was to cover the whole subject of delegating the power to railroad corporations to consolidate, lease, and purchase by section 923, and in this respect to revise and repeal the provisions of sections 911 and 912. So far, therefore, as the

power is involved, section 923 displaced and repealed all former laws upon that subject. Whether a certain manner of procedure laid down in section 911 is yet in force, we need not here inquire.

Proceeding, then, the case comes to this: If the law (section 923) is not in conflict with the constitutional section quoted, the Butte, Anaconda & Pacific Company can lease the Montana Railway line irrespective of all questions of competition or parallelism. We now speak of leasing only, because the power to consolidate, although expressly given by section 923, obviously can only be exercised in a constitutional manner; that is, by railroad corporations not owning or having under their control parallel or competing lines. The language of the constitution in respect to consolidation is too plain to require any argument on that point. No one could seriously contend that, if the railroad corporations, parties to the lease in question, are parallel or competing, they can consolidate into one resultant corporation, directly or indirectly. Section 923 is to be read as merely authorizing the amalgamation or consolidation of railroads not forbidden to amalgamate or consolidate by the constitution. (Cooley's Constitutional Limitation, 218.)

The correctness or applicability of these rules of construction is not seriously controverted, we take it, by the attorney general. There is, therefore, authority in the railroad corporations concerned in this suit to make the contract of lease under section 923, unless such authority is denied under the constitution, for the reason that the lines involved are parallel or competing lines, and that the lease between them is a consolidation of one with the other.

We now directly meet the recurrent questions: Are the roads of the Butte, Anaconda & Pacific and the Montana Railway Companies parallel or competing lines, and, if they are, may they contract by lease? The true rule is that whether two railroads are parallel or competing is a question of fact—of physical fact. Actual mathematical parallelism is easily demonstrable by engineers' maps of surveys and calculations.

Exact parallelism, however, is not what is included in the meaning of the words of the constitution forbidding consolidation of parallel railroads. A reasonable construction must obtain. In a mountainous country it is well nigh impossible to conceive of two railroads running any distance precisely equidistant at all points. We should say that by parallel railroads are meant railroads running in one general direction, traversing the same section of country, and running within a few miles of one another throughout their respective routes. They may or may not be competing. That depends upon their termini, and their commands of traffic. (*L. & N. Railroad Co.* v. *Kentucky*, 161 U. S. 677, 16 Sup. Ct. 714.)

Independently of the Montana Union Railroad, the Montana Railway cannot be said to be a parallel line to the Butte, Anaconda & Pacific between Butte and Anaconda. One of the principal terminal points of the Montana Railway line is Stuart, on the line of the Montana Union, while one of the principal terminal points of the Butte, Anaconda & Pacific is Butte. Anaconda is the other principal terminal point of each. From Stuart to Anaconda, though—a distance of about twelve miles—there is a substantial parallelism in their routes. Still, we think it doubtful whether the Montana Railway is a parallel line of the Butte, Anaconda & Pacific in a sense that would prevent its union with the Butte, Anaconda & Pacific, if such consolidation or union were attempted under the law.

But, passing that question without decision of it, are they competing lines of railway? Here again, if we take the separate corporation, the Montana Railway Company, and its railroad line as an independent one, and examine the maps and consider the section through which the roads run, we find there could be no substantial competition with the Butte, Anaconda & Pacific, for the reason that the traffic between Stuart and Anaconda on the Montana Railway, and that point on the Butte, Anaconda & Pacific nearest to Stuart and between such point and Anaconda, and between intermediate points and Anaconda, is entirely insignificant, as there are no towns or freight stations, to furnish business sufficient to make such

competition along the lines of the two roads between such points and the city of Anaconda. Whether lines of road are competitive or not depends upon the business of the companies, the conduct of the roads by their authorities, their channels of traffic, and generally—nearly always—upon whether the roads extend for transportation from and to the same points along their routes. Strictly speaking, the line of road of the Montana Railway Company consists of the road—the superstructure—over which it operates its trains in the exercise of its franchise, and none other. From an exact standpoint it is limited in its railroad operation to the few miles of rails and other property belonging to its own corporation, inasmuch as it neither controls nor operates other roads by lease, ownership, consolidation, or otherwise. Thus literally regarding the situation, there could be no competition between the Montana Railway and the Butte, Anaconda & Pacific lines.

But a majority of the court prefer to adopt what we think to be a more practical way of looking upon this branch of the case, and to consider the constitution as comprehending by competing lines not only railroads which run between the same two principal points on their own lines, but those which, having one common terminus, yet are actually connected with other railroads, and which, by arrangements with such other railroads concerning the transportation of freight and passengers, are so related to one another in fact as to give them the opportunity by geographical situation to directly cut rates to principal or terminal points. (*E. L. & Red River Railway Co.* v. *State*, 75 Tex. 434, 12 S. W. 690.) To apply this by a plain illustration: A merchant in Anaconda buys his goods at San Francisco. The goods are delivered in transit at Butte. From that point to Anaconda the merchant has a choice of routes, one practically as direct as the other. He may ship over the Butte, Anaconda & Pacific to Anaconda, or over the Montana Union to Stuart, and thence to Anaconda via the Montana Railway route. They are equally convenient and in a situation to underbid one another as to the rates of transportation. Especially is this so in the illustration given, for

the Montana Union and the Montana Railway Companies are both under the control of the Northern Pacific, so that the traffic arrangements as well as other conditions exist whereby the competition can be vigorous and effective. Conditions of fact made apparent by the record and plats before us have, for the reasons given, led a majority of the court to conclude that by its alliance with the Northern Pacific, and its geographical situation, the Montana Railway line is a competing line with the Butte, Anaconda & Pacific between Butte and Anaconda.

Reverting to the constitution, we find no prohibition against a railroad corporation leasing its stock, property, or franchise to any other railroad corporation, or having under its control a parallel or competing line, unless a leasing is a consolidation, or unless there are other parts of Section 6 of Article XV which should be construed as prohibiting such contracts of lease. Many constitutions, in their provisions to guard against all possible contingencies whereby competition between railroads may be interferred with, do prohibit leasing or purchasing, as well as consolidation; others, in terms much like ours, only prohibit consolidation.

As bearing upon the evident policies of several certain states at the dates of their adoption of their respective constitutions, provisions of organic laws as they stood in 1894 upon this subject may be grouped as follows: The following states provide that no railroad corporation, or the lessees, purchasers, or managers of any railroad corporation, shall consolidate the stock, property, or franchises of such corporation with, or lease or purchase the works or franchises of, or control, any other railroad corporation owning or having under its control a parallel or competing line: Arkansas, Sec. 4, Art. XVII, Constitution of 1874; Kentucky, Sec. 201; Missouri, Sec. 17, Art. XII, Constitution of 1875; Pennsylvania, Sec. 4, Art. XVII; Texas, Sec. 5, Art. X.

The following states substantially provide only that no railroad corporation, or the lessees or managers thereof, shall

consolidate its stock, property, or franchises with any other railroad corporation owning, or having under its control, a parallel or competing line: Colorado, Art. XV, Sec. 5, Constitution of 1876; Illinois, Art. XI, Sec. 11; Michigan, Art. XIX, Sec. 2, Constitution of 1850; Nebraska, Sec. 3, Art. XI, Constitution of 1875; Washington, Sec. 16, Art. XII, Constitution of 1889.

The constitutions of North Dakota (Sec. 141, Art. VII, of the Constitution of 1889) and of South Dakota (Sec. 14, Art. XVII, Constitution of 1889) prohibit in identical language the consolidation of the stock, property, or franchises of railroads owning parallel or competing lines, but especially provide that "any attempt to evade the provisions of this section [pertaining to consolidation] by any railroad corporation by lease or otherwise, shall work a forfeiture of its charter." There we have, in effect, a provision against leasing for a long time, if not altogether.

In West Virginia, by Sec. 11, Art. XI of the Constitution of 1872, consolidation or obtaining the possession of parallel or competing lines by lease or other contract is prohibited without the permission of the legislature. The statutes, Sec. 53, p. 532, Code of West Virginia, give these rights, and provide the manner of their exercise.

In Wyoming, Sec. 8, Art. X of the Constitution of 1889, there is simply a general prohibition against consolidation or combination of corporations of any kind to prevent competition. No special clause is found as applicable to railroads or any other class of corporations.

In Georgia Article IV, Part 4, Subdivision 11, of the Constitution denies to the legislature the power to authorize any corporation to make any contract with another corporation "which may have the effect or be intended to have the effect to defeat or lessen competition in the respective businesses or to encourage a monopoly."

In Utah, Sec. 13, Art. XII, Constitution of 1895, consolidation is prohibited with any other railroad "owning a competing line." This utterance is the very latest constitutional

provision, and is noteworthy as not prohibiting leasing or purchasing, or even consolidation, of one road with another which has under its control a competing line or a parallel line.

Comparison between these various constitutional limitations shows that no one is precisely like the prohibition of the Montana constitution. Similarity exists in but one principal respect. Almost every constitution imposes various limitations upon the power of consolidation, and so general is antagonism to the consolidation of competing railroads that, where the constitutions are silent, statutory enactments frequently prevail by which the principle is affirmatively established that there shall be no consolidation of competing railroads. Minnesota, Sec. 2716, St. 1894; Arizona, Sec. 318; New Hampshire, Gen. St. p. 377, Sec. 11; New York, Laws 1869, ch. 917, Sec. 9; North Carolina, Battle's R. S., p. 751, (65); Wisconsin, Rev. St. Sec. 1833. In Florida, Sec. 2248, St. 1892, parallel or competing roads may not consolidate except by consent of the railroad commission. Other states, by withholding the power to consolidate, prohibit the exercise of it.

Conforming to this general policy, Montana has by no uncertain language aligned herself with her older sister states, where experience has demonstrated that the merger of two competing railroads into one is apt to result in stifling free competition, and hence is disadvantageous to the well-being of the state. Sufficient demonstration of this proposition consists in the statement that great accumulations of property in the hands of any corporate power, likely to hold on to such accumulations, are dangerous to public welfare. The life of an individual is too limited to render such dangers very great where tremendous wealth is in his hands, but a corporation seldom feels that the bounds of human life, or even of its own chartered existence, should too closely circumscribe its actions. Restraints by limitations upon and within their grants of powers are necessary, lest they may become much too strong for society.

If, for instance, consolidation were allowed with no bounds of restraint, a railroad's possessions might become a colossal

enterprise owning all means of transportation within a state. Without rivalry of railroads, monopolies might grow up, and, to bring the dangers of destroying competition before us, that remarkable progress which this young state has made in its healthy development could be stayed by the consolidation or amalgamation of railroad corporations owning competing lines. The maxim, "Competition is the life of trade," forms the base of the constitutional prohibition against consolidation of rival railroads, and whatever consolidation does include within its meaning is absolutely illegal and void.

What is a consolidation of one railroad corporation with another? Rorer on Railroads p. 588, thus defines it: "The consolidation of two or more railroad corporations is the permanent union of their interests, management, and control, either in the formation of a new company out of the consolidated ones, or else by a consolidated management of the old ones unitedly, whilst their distinct corporate entities still remain. It can only be brought about by authority of law. A mere co-operating temporarily in the running of lines and transacting the business of two or more roads does not amount to a consolidation thereof."

The supreme court of Alabama, in *Meyer* v. *Johnston*, 64 Ala. 603, said: "When the rights, franchises, and effects of two or more corporations are, by legal authority and agreement of the parties combined and united into one whole, and committed to a single corporation, the stockholders of which are composed of those (so far as they choose to become such) of the companies thus agreeing, this is in law, and according to common understanding, a consolidation of such companies, whether such single corporation, called the consolidated company, be a new one then created, or one of the original companies, continuing in existence with only larger rights, capacities, and property. Acceptance of this as correct makes it easy to understand that authority given to consolidate 'to such extent, and on such terms, as the parties may agree upon' confers the power to constitute one of the original companies the consolidated company."

From the Alabama court's opinion, Reese on *Ultra Vires* (section 142) has deduced his text, from which we quote: "'The 'consolidation' of a corporation has been defined to be 'a surrender of the old charters by the companies, the acceptance thereof by the legislature, and the formation of a new corporation out of such portions of the old as enter into the new.' The more modern understanding of a consolidation, however, might be better stated by saying that when the rights, franchises and effects of two or more corporations are by legal authority and agreement of the parties combined and united into one whole, and committed to a single corporation, the stockholders of which are composed of those of the companies thus agreeing, this is in law a consolidation, whether the consolidated company be a new one then created or one of the original companies continuing in existence with only larger rights, capacity, and property. 'Amalgamation' has been declared to be when the existing companies agree to abandon their respective articles of association and regulation, and to register themselves under new articles as one body. This would be a new company, formed by the coalition or amalgamation of the companies previously existing. The expression 'amalgamation,' however, is of English origin, has never appealed to the judicial sense of this country, and is seldom used to designate the union of two or more corporations, the word 'consolidation' being the term in common use."

In *Mackintosh* v. *Flint & P. M. R. Co.*, 34 Fed. 582, the court, recognizing a difference between a purchase and a consolidation, observed: "Under the general railroad law, companies are allowed to consolidate when they form continuous or connecting lines. This contemplates the formation of a new corporation, and requires the consent of the majority of the stockholders in each company. This statute, however, does not cover this case. This is not to be a consolidation, but a purchase of the latter company's stock, property, and franchises, and to use the same as part and parcel of the purchasing company, and then to bring the acquisition within the op-

eration of its own charter. The consolidation statute does not authorize one company thus to acquire and absorb another."

Elliott on Railroads says: "Ordinarily, the effect of a consolidation is to dissolve the old companies and to form a new one; but this result does not always follow, for it depends largely upon the terms of the consolidation, and the legislative intent as manifested in the statute under which the consolidation takes place; and the constituent companies usually have at least a qualified existence for the purpose of winding up their affairs and preserving the rights of their creditors. The term 'consolidation' is an elastic one, and may include a union of two or more corporations into a new one with a different name, with or without extinguishing the constituent corporations, or the merger of two or more corporations into another existing corporation under the name of the latter. There is, as we have already said, a distinction between these modes of consolidation. In the latter case, if the merger is complete, it is evident that the one corporation is extinguished, unless kept alive for certain purposes, while it is equally clear that the other, in which it is merged, is not dissolved. In other words, the legislative intention in such a case would seem to be to unite the two companies under the old charter of one of them, while statutes authorizing the consolidation of two or more corporations in the ordinary way are generally construed as authorizing the formation of a new and distinct corporation, thus extinguishing all the constituent companies unless a contrary intention is manifest." (Sec. 335.)

Further citations from the great number of cases that we have studied would be superfluous, for they are practically uniform in defining a consolidation of corporations to be a merger, a union, or amalgamation, by which the stock of the two corporations is made one, by which their property and franchises are combined into one, by which their powers become the powers of one, by which their names are merged into one, and by which the identity of two practically, if not actually, runs into one.

Section 911 of the Civil Code of Montana is not merely a

legislative declaration of the manner of consolidation, but serves as a definition as well. It specially provides how two railroad corporations may become one by any name adopted, how their shares may be retired or exchanged for the capital stock of the resultant corporation, how the corporation formed by the consolidation shall succeed to the rights, powers, privileges, franchises, immunities, and property possessed by the corporations so consolidated, etc.

Ordinarily no idea of a lease would ever enter into any explanation of what constituted a consolidation, unless such contract of lease was for so long a period of time, or by its terms was such as to make it a practical merger of one corporation into another. Lease does not imply consolidation, nor consolidation lease. The power to consolidate, as has been seen, is a power to make two corporations one; the power to lease carries with it no power to pass anything except the right to use the property leased. In the lease under consideration there is no merger of ownership, no communion of interest, no distribution of receipts based upon a contingent measure of profits, no common ownership of shares of stock, no joint management, and no yielding up of an independent corporate existence by the lessor to the lessee.

As was said in *State* v. *Vanderbilt*, 37 Ohio St. 590: "Power to lease does not imply the power to consolidate, nor power to consolidate the power to lease. They are distinct and independent powers. Nothing passes under the lease except the right to the use. The lessor retains its existence, and its right to consolidate with connecting lines. There can be no consolidation except as to connecting lines. These connecting lines belong to the lessor companies, but these have not entered into the consolidation."

In *Mills et al., executors*, v. *Central R. of New Jersey*, 41 N. J. Eq. 1, 2 Atl. 453, a question arose involving the power to lease under a power to consolidate. Chancellor Runyon, for the court, expressly held that power to consolidate did not involve authority to lease, and did not enlarge an authority to convey lands, etc., conferred by a charter to a railroad com-

pany. The reasoning of that case was that a power to consolidate is to take in a partner, or to go in as a partner, while power to lease is power to dispose of the whole concern to a stranger. "In a consolidation," say the court, "the stockholders of the respective companies still retain, to a certain extent, control of their corporate property, but by a lease the stockholders of the leasing company part with the control of their corporate property, and hand it over to the others, and abandon their enterprise."

We cannot approve altogether of the reasoning of the chancellor, except as it was applicable to the facts of that case, which involved a railroad lease of 999 years. We are of the opinion that a lease, fair in its terms, for 10 years, in no manner involves an abandonment of a railroad enterprise, or is in fact more than a temporary parting with the control of the lessors' corporate property. Reservations in this lease of the Montana Railway Company to the Butte, Anaconda & Pacific give the lessor corporation right to repossess itself of its property, and to oust the lessee, and terminate the lease, in the event of certain violations of the covenants of the contract. There is nothing contained in its provisions from which an abandonment can be inferred. The case cited is none the less a strong support of the view that the prohibition against a power to consolidate does not include a prohibition of a power to lease when the legislature has clearly authorized such latter power; for, if a lease of 999 years is not a consolidation, *a fortiori*, a lease of 10 years is not.

Distinction has also been made between union and consolidation and purchasing by one railroad corporation of another's property and franchises. By the railroad law of New Jersey power was given to railroad companies to lease their roads to any other corporation, or to unite and consolidate. But the court held, in *Elkins* v. *Camden & Atlantic R. R. Co.*, 36 N. J. Eq. 5, that there could be no purchase of a rival railroad under a power of consolidation, as the powers given did not authorize it.

In *Gere* v. *N. Y. Central, etc., R. R. Co.*, 19 Abbott's

New Cases, 193, we have an adjudication of this important question directly in point. The case is of high authority because of the list of eminent counsel who presented it to the court. Gero and others brought an action on their own behalf and in behalf of all other stockholders of the New York Central & Hudson River Railroad Company against that corporation and the New York, West Shore & Buffalo Railroad Company and certain firms to restrain the consummation of a lease between the railroad companies. The West Shore & Buffalo Company was a competing road in all respects for its entire length. It attempted to lease its road, property and franchises to the New York Central Company for the term of 475 years. The rental consideration was a guaranty of payment of the principal and interest of certain bonds of the West Shore road. The statute of New York authorized any railroad corporation to contract with any other railroad corporation for the use of their respective roads, and thereafter gave the use of the leased railroad in such manner as might be prescribed in the contract. The statute then contained these words: "But nothing in this act contained shall authorize the road of any railroad corporation to be used by any other railroad corporation in a manner inconsistent with the provisions of the charter of the corporation whose railroad is to be used under such contract." By Section 9, of Chapter 917, Laws of 1869 of New York, railroad corporations were also authorized to consolidate and merge their capital stock, franchises, and property with the capital stock, franchises and property of any other railroad, etc.; and it was further provided that "no companies or corporations of this state whose railroads run on parallel or competing lines shall be authorized by this act to merge or consolidate."

The court, through Kennedy, J., first disposed of the question of power to lease by holding that it existed under the statutes referred to, and then discussed the prohibitory section above quoted in the following language: "The leasing of one railroad by another, whether for a longer or shorter period, is not a merger or consolidation. The term 'lease'

implies the continued existence of the corporation, the lessor, with all its powers and functions, and all the rights incident to its creation, and it would be a gross misapplication of terms to hold that a leasing or contract for use by one railroad to another is a merger or consolidation of the two roads. I am therefore forced to the position that it—the West Shore road—has the authority to execute the lease, and the New York Central has the power and right to receive the same, and to pay rental for the use thereof; and because said roads are competing roads, there being no statutory inhibition upon that ground, it is not a reason why a lease may not be executed by the one and accepted by the other. Upon the assumption that the legislature has authorized a lease between two roads situated as these two roads are, the question of public policy does not enter into a consideration of the questions involved here. If the power has been granted by the legislature, although it may be deemed unwise, and in this instance dangerous in its execution, the remedy will be found in another department of the government, and is not lodged in the judiciary. Several statutes recognize the right, power and authority of the lessee of a railroad to receive by transfer from the lessor, or other or others owning the same the capital stock in the leased road. (L. 1855, c. 302; L. 1867, c. 254; L. 1883, c. 383.")

Thompson on Corporations, Vol. 5, Sec. 5891, approves of the doctrine of *Gere* v. *N. Y. C. etc. Co.*, *supra*, and says that "a statute prohibiting railroad corporations whose roads run on parallel or competing lines from merging or consolidating does not prohibit one such corporation from leasing its road to another."

As against the right to contract by lease, the learned attorney general relies upon the case of *State* v. *Atchison, etc.*, 24 Neb. 143, 38 N. W. 43. There the question arose of the power of two lines of railway to consolidate, when, after they were consolidated, they would form a continuous line without break of gauge or interruption. It was held that the Atchison & Nebraska Railway, extending from

Atchison, Kan., to Lincoln, Neb., and leased to the Burlington & Missouri River Railroad, did not form a continuous line with the Burlington & Missouri, and that the case was not within the provision of the statute authorizing the making of a lease where the roads of the lessee and lessor will form a continuous line, and that the lease was, therefore, unauthorized. After deciding this question, the court, through Maxwell, C. J., proceeded *obiter* to fortify its decision upon the further ground that the lease was, in effect, prohibited by the constitutional provision against consolidating railroad corporations owning parallel or competing lines. "The word 'consolidate,'" said the chief justice, "is here used in the sense of 'join' or 'unite.' The constitution aimed at practical results. * * * The law cannot be evaded, therefore, by substituting a lease for a deed of conveyance." The court regarded the lease in that case as within the inhibition of the constitution. The decision of the Nebraska case was based, however, upon a construction placed upon an attempt by one railroad to lease another competing road for a period of 999 years, and what we have said heretofore in relation to the proper limitations to be put upon the language of Chancellor Runyon in the New Jersey case is applicable to the Nebraska decision also. A lease for 999 years may be properly regarded as a joinder or consolidation of two competing railroads; it may be such a lease practically involves the consolidation and control of parallel or competing roads, and necessarily, in effect, operates as a surrender of corporate franchises by the lessor corporation. This point was emphasized in the opinion. But conceding, for the sake of argument, that the Nebraska decision is directly in point, its force and effect are very much weakened by the subsequent decision by the same court in the same case, reported in *State* v. *Atchison, etc., Railroad Co.*, 38 Neb. 437, 57 N. W. 20. After the first decision, in 1888, by Chief Justice Maxwell, and after it had been held that the lease of respondent to the Burlington & Missouri River Railroad Company should be declared void, upon a demurrer, respondent answered and negatived all the

allegations of infringement of the provisions of the statutes and constitution of the state of Nebraska. The referee afterwards decided that the roads were not competing roads within the meaning of the constitution, and that, therefore, the lease was valid. The court sustained the lease by a brief opinion. Chief Justice Maxwell, who had written the opinion of the court at the former hearing, dissented, principally upon the ground that the roads were competing roads, and that the lease was a violation of the constitutional provision. His construction of the majority opinion is that it contains an admission that the defendant is a competing line at the most important point on the roads, and upon this admission he says there is no power to declare such consolidation not prohibited by the constitution. The case stands, therefore, as practically overruled by this later decision, for there is no escaping the conclusion made plain by Judge Maxwell that the court has receded from its former doctrine.

Pearsall v. *G. N. Railroad Co.*, 161 U. S. 646, 16 Sup. Ct. 705, also cited by the attorney general, involved a proposed arrangement between the Great Northern and Northern Pacific Railway corporations, by which there was to be an organization of a new corporation, which should issue its bonds, payment of which was to be guaranteed by the Great Northern, part of the capital stock to be transferred to the shareholders of the Great Northern; and a traffic contract was to be entered into by which the common earnings were to be divided, and traffic was to be exchanged. The statutes of Minnesota forbid railroad corporations to consolidate with, lease, or purchase, or in any way to become owner of or control, any other railroad corporation, or any stock, franchises, rights, or property thereof, which owns or controls a parallel or competing line. The case was decided upon the theory that the arrangement was a consolidation of two competing corporations. The agreement between them was regarded as nothing less than a purchase of a controlling interest, and as practically contemplating the absolute control of the Northern Pacific by the reorganized corporation. The "ultimate amal-

gamation'' seemed apparent to the court, and the statute was held applicable to prevent such an amalgamation. The decision affirms our views upon the question of consolidation, but, considering the statute of Minnesota, it has little or no bearing upon the questions involved in this case.

We are not unmindful of the spirit which pervades the more modern constitutions against arrangements between competing lines of railroad which may result in monopolies of traffic, and we are not disposed to yield at all in that rigidity of interpretion which we believe must be placed upon the prohibition of the constitution against consolidation of such roads. On the other hand there are certain fundamental principles of construction by which courts must be guided in correctly ascertaining the intent of a written constitution. Judges are not at liberty to declare an act of the legislature void because, "in their opinion, it is opposed to a spirit supposed to pervade the constitution, but not expressed in words." (Cooley on Constitutional Limitations, p. 204.) The framers of the constitution are presumed to have employed language with sufficient precision to convey the intent of the instrument framed. And when they only prohibited consolidation of competing railway lines, we understand the word to have been used in its natural sense, and that the constitution intended what it says; that is, forbids what it has forbidden. Nor does an apparent impolicy of a statute authorize a court to declare it void. "When the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, we cannot declare the limitation under the notion of having discovered something in the spirit of the constitution which is not even mentioned in the instrument." (*People* v. *Fisher*, 24 Wend. 215.)

There is a conclusive presumption, when a state law is attacked upon the ground that it is void, that it is valid unless the constitution of the state prohibits it. Before it can be set aside as invalid, we must find that "limitations have been imposed upon the complete power which the legislative department of the state has vested in its creation." (Cooley on Constitutional Limitations, p. 206.)

It is therefore upon these principles that we have patiently and deliberately considered this case. What exigencies may have arisen which deterred the framers of the constitution from prohibiting reasonable leases by one railroad of another, even though they be of competing lines, it is not for us to say. In Montana, as in many other states, the question of authority for leasing railroads has been left to the legislature, which has in turn exercised its power. The courts cannot determine a policy unless it is fairly to be inferred from the language used. It may have been the belief that excessive restrictions, such as the denial altogether of the power to lease, were unwise, and likely to result in greater harm than good; or it may have been the security felt in the knowledge of the fact that by section 5 of the same article of the constitution, which prohibited consolidation, all railroads are deemed subject to legislative control, and subject to the power of the legislature to regulate and control by law the rates of transportation of passengers and freight by such companies as common carriers from one point to another in the state. Safety against extortion is always guaranteed by this section; and if the two corporations, parties to this contract of lease under consideration, should attempt to charge excessive rates, the power is in the legislature to protect the people. In the particular lease before us, provision is made by covenant against increased rates.

In conclusion, it is our unanimous and mature judgment that, while the constitutional section quoted absolutely prohibits consolidation, whether it be direct or indirect, still the difference between a lease and consolidation is too plain to allow any interpretation being put upon the constitutional section quoted, whereby the power to lease is denied by the prohibition against consolidation.

It is unnecessary to dwell upon the latter clause of section 6, Article XV of the constitution, heretofore quoted, by which one railroad shall not unite its business, etc., with the business of another railroad, as we are all of the opinion that it cannot be applied at all to the case before us, but pertains to different conditions.

The petition is denied. *Petition denied.*

PEMBERTON, C. J., and PIGOTT, J., concur.

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

JUNE TERM, 1898.

PRESENT:

HON. WILLIAM Y. PEMBERTON, Chief Justice.

HON. WILLIAM H. HUNT, } Associate Justices.
HON. WILLIAM T. PIGOTT, }

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21 251
27 495

MATTIE E. BURNS, RESPONDENT, v. MARY S. SMITH, ET AL., APPELLANTS.

[Submitted March 30, 1898. Decided July 5, 1898.]

Equity Jurisdiction—Agreement to Devise—Specific Performance—Evidence—Res Gestae.

1. EQUITY JURISDICTION—*Agreement to Devise—Specific Performance.*—Under Section 11, Article 8, of the State Constitution, which provides that district courts "have original jurisdiction in all cases in law and equity where the claim is for fifty dollars or more," the district court, sitting as a court of equity, has jurisdiction to try and determine an action brought against an estate of a decedent to enforce an agreement made by deceased to devise a certain share in his property. Jurisdiction in such cases is not confined to the district court sitting as a court of probate.

2. AGREEMENT TO DEVISE—*Specific Performance.*—A court of equity will enforce against the estate of a deceased person his promise made with a third person to leave a definite share of his property in return for services rendered by the promisee; although the agreement contained an invalid contract of adoption.
3. SAME.—The evidence in this case examined and held to sustain the finding that deceased had agreed to leave to plaintiff a child's share of his estate.
4. Where deceased had promised to leave to one sought to be adopted a child's share of his estate, in return for her companionship and obedience, the fact that the promisee left his home and remained away for some time, or did not yield to him the obedience the contract demanded, cannot be taken advantage of by his heirs at law; he not having rescinded the contract.
5. EVIDENCE—*Res Gestae.*—In an action to enforce the performance of an agreement to devise, the evidence tended to show that in 1885 the agreement was made by the deceased, in consideration of the plaintiff's agreement to live with deceased and his wife and to render to them the services and affection of a child of her age. *Held*, that the acts and declarations of deceased, made after the agreement and while plaintiff was living with him and his wife, were part of the *res gestae*, and were admissible in evidence under Section 3126, Code of Civil Procedure, providing that "where also the declaration, act or omission, forms part of a transaction which is itself the fact in dispute, or evidence of that fact, such declaration, act or omission is part of the transaction."

Appeal from District Court, Lewis and Clarke County; H. N. Blake, Judge.

SUIT by Mattie E. Burns against Mary S. Smith, administratrix, and Norman B. Holter, administrator, of the estate of James M. Smith, deceased, and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Statement of the case by the justice delivering the opinion.

This is an action for the specific performance of a contract. The defendant, Mary S. Smith, is the surviving widow of James M. Smith, and also his administratrix. Norman B. Holter is the administrator of said estate. The other defendants are the heirs at law of the said James M. Smith, who died intestate in Lewis and Clarke county on the 4th day of February, 1896. The material allegations of the complaint, and which were found in favor of the plaintiff in the special findings of fact made by the jury, are substantially as follows:

That about July 4, 1885, the plaintiff, at the solicitation of James M. Smith and Mary S. Smith, his wife, by an agreement made with the mother of plaintiff, went to live with the Smiths at their home. At that time plaintiff was 10 years

old. The Smiths were then, and at all times have been, childless. Plaintiff went to live with them under the agreement and with the understanding that, if James M. Smith was pleased with and liked the plaintiff after she had lived in their home as their child for a reasonable time, he would adopt her as his own child, so that she, on his death, should receive a child's share of his estate, the same as if she had been born his child in lawful wedlock. That plaintiff, with such understanding, went to live with the Smiths, and so continued to live with them, rendering to them such obedience and performing such services as a child of 10 years commonly renders and performs for its own parents, and obeying the Smiths as if they were her natural parents; that after the plaintiff had lived with the Smiths for about one year, and the said James M. Smith had become fully satisfied with and liked the plaintiff, and, having no children of his own, he entered into an agreement with the mother of the plaintiff, whereby, in consideration of said plaintiff, then a girl of 11 years of age, being surrendered to him, and in further consideration of such services as plaintiff would render him as his child, and the further consideration of the companionship of said plaintiff, he promised and agreed with the plaintiff's mother and the plaintiff that he would care for plaintiff as his own child, and adopt her, and further agreed that on his death she should receive a child's share of his estate. That in pursuance of said agreement the mother of the plaintiff then and there surrendered the care, custody and control of said plaintiff to the said James M. Smith, and that he took her and placed her in his household as his child, and continued to contribute to her care, maintenance, and support as his child until her marriage, on January 19, 1895, and thereafter continued to recognize her as his child up to the time of his death. The complaint further alleges that the plaintiff performed all of the conditions of the said contract on her part, and yielded the obedience to the said James M. Smith and his wife due from a child to its parents, treating and regarding them the same as she would her natural parents, relying upon the said James M. Smith's

declarations that she was his legally adopted child and heir; that she was known and recognized by the name of Mattie E. Smith, instead of her own name, Mattie E. Kates, and was introduced and declared by James M. Smith to be his adopted daughter and heir; that she called the Smiths "father" and "mother" while she lived with them; that she performed all the household duties such as a daughter usually performs for her own parents up to the time of her marriage, in January, 1895; that she was married to her husband at the home of, and with the full approbation of, said James M. Smith; that about July, 1886, a formal contract and deed of adoption was drawn up, at the special instance and request of said James M. Smith, whereby plaintiff was duly and legally declared to be adopted as the child and legal heir of said Smith, and that on his death she should receive a child's share of his estate; that said contract was signed by James M. Smith and the mother of the plaintiff, but that the same was never recorded; and plaintiff avers, on information and belief, that said deed of adoption has been destroyed by defendant Mary E. Smith, the surviving widow of James M. Smith. The complaint then alleges that plaintiff never knew that said deed of adoption was illegal and of no effect as a deed of adoption until informed by her counsel, after the death of said James M. Smith; that said Smith left an estate of about $55,000, and that the administratrix, the surviving widow, administrator, and the heirs at law of James M. Smith, deceased, claim to be entitled to all of the estate of said James M. Smith, and deny that plaintiff has any right or interest therein; that she presented her claim to the administrator and administratrix of said estate within the time prescribed by law, and that the same was entirely rejected. The plaintiff asks for a decree of the court establishing her right to a child's share of the estate of James M. Smith, deceased, under and in accordance with the contract and agreement entered into as aforesaid, and that said contract, when so established, be enforced against said estate and the defendants herein, and that upon the distribution of the estate she be entitled to receive one-half thereof.

The answer denies all the material allegations of the complaint. The case was tried with a jury, and findings of fact were submitted to them, covering, as stated above, the material allegations of the complaint. All of the findings were in favor of the plaintiff, and were all adopted by the court, and judgment rendered in accordance therewith. From the judgment and an order of the court overruling defendants' motion for a new trial, this appeal is taken.

Cullen, Day & Cullen, for appellants.

Specification No. 45 assigned as error the action of the court in overruling the objection of the defendants to the introduction of any evidence upon the ground that the court had no jurisdiction. As this objection goes to the very foundation of the right of plaintiff to maintain this action, we will consider this first. The determination of the question as to who are the distributees of an estate of a deceased, properly comes under the administration of the estate and under the court having charge of the administration. Department 2 is by the established rules of the district court of Lewis and Clarke county the court of probate, and having reduced the estate to its possession, by issuing letters of administration, and the estate being still in the course of administration, that court had exclusive jurisdiction to determine the question of heirship of this plaintiff. (*In re Burton's Estate* (Cal.), 29 Pac. 36.) A proceeding to appoint an administrator is a proceeding *in rem*, and the tribunal first acquiring jurisdiction retains it to the exclusion of another court which might have acted if its process had been invoked. (*State* v. *Benton*, 12 Mont. 75; 1 Pomeroy's Equity Jurisprudence, Secs. 77, 347–350; Works on Courts, pages 68–72.) The Code of Civil Procedure prescribes the method of proceding for determining heirship and the method of acquiring jurisdiction in such proceedings. The principle *exclusio unius est exclusio alterius* fully applies, and this action not having been brought in accordance with the statute, the court had no jurisdiction to proceed in the matter. (Citing Secs. 2840, 2841 and 2842.) These sec-

tions of our code are taken from the California code, and the supreme court of that state has construed its statute in the cases of *Smith* v. *Westerfield*, 26 Pac. 206, and *In re Burton's Estate*, 29 Pac. 26. (Citing, also, *Siddall* v. *Harrison*, 73 Cal. 560; *Blythe* v. *Ayers*, 36 Pac. 522; *N. P. R. R. Co.* v. *Patterson*, 10 Mont. 106; *Kieley* v. *McGlynn*, 88 U. S. 503.)

Where authority to proceed in courts is conferred by statute, and where the manner of obtaining jurisdiction is prescribed by statute, the mode of proceeding is mandatory and must be strictly conformed to, otherwise the proceeding will be void. (23 Am. and Eng. Ency. of Law, 468; *Thatcher* v. *Powell*, 6 Wheat. 119; *Railroad Co.* v. *Telegraph Co.*, 112 U. S. 306.) Where a suit is brought to determine heirship before the expiration of a year after granting letters of administration, the court has no jurisdiction to proceed. (*Smith* v. *Westerfield*, *supra*.) The plaintiff claimed the right to bring her action as she did, and not under Section 2840, because she says that it is a proceeding in which chancery jurisdiction could be invoked long before the enactment of Section 2840 of our Code of Civil Procedure, and that inasmuch as our code does not assume to take away by express words this chancery jurisdiction, that the two jurisdictions are concurrent. We are not prepared to admit that equity has jurisdiction of this action in the absence of statute. In Massachusetts suit was brought in equity to enforce a contract similar to the one at bar, and the court held that a court of general equity jurisdiction had no jurisdiction to establish the claimant's rights. That the proper forum was the probate court. (*Ross* v. *Ross*, 123 Mass. 214, and 72 N. W. 59.) We contend that Article 2 of Chapter 11 of the Code of Civil Procedure was designed by the legislature to take the place of every other form of action, and that it operates as an abrogation of such, just as clearly as if it had been done by express words. (Citing 1 Pomeroy's Jurisprudence, Sec. 182; *Ex parte Harke*, 49 Cal. 465.) But if it were true, as contended by counsel for plaintiff, that the statutory remedy did not exclude the equitable remedy, unless there were express words of prohibition, it seems to us that

the result would be that the two remedies would be concurrent, and that upon familiar principles of jurisdiction, the court first assuming jurisdiction of the estate would be the one entitled to proceed and continue such jurisdiction throughout, where it is able to determine the whole controversy. (12 Am. and Eng. Ency. of Law, page 292; *Deck* v. *Gerke*, 12 Cal. 433, 73 Am. Dec. 558, note.) But we think the true solution of the question is, that our statute has assumed to provide the remedy and the method of acquiring jurisdiction, and that where it is apparent that this was the purpose of the legislature that the statutory remedy is exclusive. (Citing, *Hughes* v. *Case*, 1 Bland (Md.) 46; *Osborn* v. *Ordinary of Harris Co.*, 17 Ga. 123.)

Admitting the allegations of the complaint to be true, is the plaintiff entitled to recover a distributive share of the said estate as heir? At the time of the execution of the alleged contract there was no statute in Montana relative to the adoption of children. Adoption was unknown to the common law and was repugnant to the principles thereof. (1 Am. and Eng. Ency. of Law (2nd Ed.), p. 726; Schouler's Dom. Relations, p. 314; *In re Johnson's Estate* (Cal.), 33 Pac. 460. Citing, also, Code Justinian, Lib. 8 Tit. 48; *Ex parte Chambers*, 80 Cal. 219, S. C. 22 Pac. 138; *Ex parte Clark*, 87 Cal. 641, S. C. 25 Pac. 967; *In re Stevens*, 83 Cal. 322; *Nugent* v. *Powell* (Wy.), 33 Pac. 23; *Webb* v. *Jackson* (Col. Ct. of App.) 40 Pac. 467; *Ferguson* v. *Jones*, 17 Ore. 204, S. C. 11 Am. St. Rep. 808; *Shahan* v. *Swan* (Ohio), 26 N. E. 222.) Where the adoption of children is regulated by statute, rights of inheritance can only be acquired, through adoption, by substantial compliance with the statutes. (*Renz* v. *Drury* (Kan.), 45 Pac. Rep. 70; *Tyler* v. *Reynolds*, 53 Iowa, 146; *Shearer* v. *Weaver*, 56 Iowa, 578; *Willoughby* v. *Motley*, 83 Ky. 297; *Wallace* v. *Long*, 105 Ind. 522; *Shahan* v. *Swan*, 48 Ohio St. 25, 26 N. E. 222; *Wallace* v. *Rappalye*, 103 Ill. 229.)

If, then, we are right in our contention that the action can be maintained only as one to specifically enforce a contract, the issues are (1) the execution of the contract; (2) its con-

tents; (3) performance by the plaintiff. The rules governing the admission of evidence in this class of cases are the same as govern in cases concerning ordinary contracts. The evidence admitted to which objection is made, which refers to the execution and contents of the contract, may be grouped into two general classes, viz: Acts and declarations of Mr. and Mrs. Smith relative to the position of the plaintiff in the family, and acts or declarations of Mr. Smith showing what he intended to do or had done for the plaintiff. The Code of Civil Procedure provides for the admission of declarations in the following cases: (Citing Secs. 3124, 3125, 3126 and 3129.). Under these provisions the declarations of another than the party affected can be admitted in three classes of cases only. (1) Declarations while holding the title in relation to the property in controversy; (2) Declarations forming part of the *res gestae*; (3) Declarations made against the declarent's pecuniary interest. It will not be contended that these alleged declarations come within the first class, as they were not made with reference to the property involved. But it is sought to bring them within one of the other two classes. Under our law, the declaration to be within the third class must be against the pecuniary interest of the party making it, a narrower construction of "against interest" than the common law rule. (*Poorman* v. *Miller*, 44 Cal. 275; *Sill* v. *Reese*, 47 *Id.* 342. Citing, also, *Mercer* v. *Macklin*, 14 Bush. 434; *Thistlewaite* v. *Thistlewaite*, 132 Ind. 355 (S. C. 31 N. E. 946); Jones on Evidence, Sec. 351; *Tilson* v. *Terwilliger*, 56 N. Y. 277; *People* v. *Vernon*, 25 Cal. 49 (S. C. 95 Am. Dec. 49; *Mack* v. *Porter*, 72 Fed. 236.)

Sanders & Sanders, for Norman B. Holter, Administrator (Appellant also).

Carpenter & Carpenter and *E. A. Carleton*, for Respondent.

The court had jurisdiction. That the district court sitting as a court of equity had exclusive jurisdiction of this action is

conclusively shown from an examination of the authorities, *infra*. Counsel for appellants, on this branch of the case, have argued a proposition entirely foreign to the case, viz., the question of heirship, the law for the determination of which is found in Article 2, Part III, Title XII, Code of Civil Procedure. Indeed, counsel truly say in their brief that this is an action "to compel the specific performance of a contract;" and, having correctly stated the nature of the case, they then proceed to an exhaustive discussion of the question for the determination of heirship under said Article 2. Hence it follows that the authorities cited by counsel to sustain their contention as to jurisdiction are not in point. It scarcely need be said that no probate court, either in this country or in England, has ever pretended to have jurisdiction to compel the specific performance of a contract, as that power is vested only in courts of general equity jurisdiction. The only exception, if such it may be called, is the provision of Section 2750, Code of Civil Procedure, which is as follows: "When a person who is bound in contract by writing to convey any real estate dies before making the conveyance, and in all cases when such decedent if living, might be compelled to make such conveyance, the court or judge may make an order authorizing and directing his executor or administrator to convey such real estate to the person entitled thereto." By the Constitution of Montana, Article 8, Section 11, "District courts have original jurisdiction in all cases in law and equity where the claim is for fifty dollars or more." Section 41 of the Code of Civil Procedure repeats this constitutional provision. Therefore, if the heirship law had attempted, which it has not, to establish an exclusive forum for the determination of such actions, such act would contravene the constitutional provision, *supra*. It is not contended that the district courts, before the adoption of the code, on July 1, 1895, did not have jurisdiction of such cases, since, prior to that time, we had no "heirship law." There is no instance where the mere granting of jurisdiction, without words of exclusion, ousts the former court of jurisdiction, and this principle has been enunciated

again and again by the supreme court of California, from which state our heirship law is taken bodily. (3 Pom. Eq. Jur. Paragraph 1153; *Perry* v. *Adams*, 26 Cal. 383; *Courtright* v. *Bair*, 30 Cal. 577; *Willis* v. *Farley*, 24 Cal. 499; *Delafield* v. *State of Ill.*, 2 Hill 159; Beach's Mod. Eq. Jur., Vol. 2, page 1111; *Burton* v. *Burton*, 79 Cal. 490; *In re Burton*, 93 Cal. 459; *Commonwealth* v. *Hudson*, 11 Gray 64). As already stated, our heirship law was taken bodily from California, hence we adopted that construction of the law which it had received in California by its highest courts at the time of its adoption, if such construction is reasonable. (*Stackpole* v. *Hallahan*, 16 Mont. 56; *State* v. *O'Brien*, 43 Pac. 1091.) Counsel quote voluminously from *In re Burton*, 93 Cal. 459, 29 Pac. 36, but they significantly omit the essential part of that decision, and which we confidently submit conclusively disposes of the question of jurisdiction. The decision states, page 37, "The statute (section 1664) exclusively authorizes and requires the court to determine the heirship to the deceased, the ownership of his estate and the interest of each respective claimant thereto or therein, which is not claimed adversely to the estate." Section 1664 is the California heirship law, identical with our own. The decision further says, on page 36, "But the provisions of the section (referring to the heirship law) are carefully limited to the ascertainment and determination of the rights and interests claimed in privity with the estate and are not applicable to rights and titles claimed adversely to such estate." Does plaintiff claim in privity with the estate or adversely to it? The term "privity" has a certain and well defined meaning in the law. "It denotes mutual or successive relationship to the same rights of property, and privies are distributed into several classes according to the manner of this relationship. Thus, there are privies in estate, as donor and donee, lessor and lessee and joint tenants; privies in blood, as heir and ancestor and coparcener; privies in representation, as executor and testator, administrator and intestate; privies in law, where the law, without privity of blood or estate, casts the land upon

another, as by escheat." (Greenleaf on Evidence, Vol. 1, paragraph 189.) It is apparent that plaintiff does not come within the meaning of any of these definitions, and hence her claim is not in privity with the estate, but is adverse to it. It not being a claim in privity with the estate, Article 2 *supra* of the Code of Civil Procedure does not apply. Plaintiff has the paramount claim of a creditor or equitable owner, which is only enforceable in a court of equity. (*Sharkey* v. *McDermott*, 91 Mo. 647.) Section 2603 of the Code of Civil Procedure provides that "All claims arising upon contracts, whether the same be due, not due or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever." Under statutes quite similar it has been held that a probate court has no jurisdiction to determine disputed claims. (1 Woerner (Am. Law of Admin.) Sec. 153; *Tucker* v. *Tucker*, 4 Keys (N. Y.) 149; *McNulty* v. *Hurd*, 72 N. Y. 520; *Green* v. *Day*, 1 Demorest 50.) In this case it is the law relating to contracts rather than the law relating to adoption that is to prevail. (*Godine* v. *Kidd*, 19 N. Y. Supp. 335. Citing, also, *Theller v. Such*, 57 Cal. 447; *Bath* v. *Valdez*, 70 Cal. 360; *Barnard* v. *Wilson*, 74 Cal. 517; *In re Romland*, 74 Cal. 523.)

The authorities are abundant to the effect that in consideration of companionship and services to be given as by a child to a parent the agreement by the foster parent that the child so surrendered to him shall have an amount equal to a child's share of his estate is valid and will be enforced. Equity will enforce such a contract. (1 Am. Law of Admin. (Woerner) page 58 and cases cited; *Parsell* v. *Stryker*, 41 N. Y. 480, 485; *Healey* v. *Simpson*, 113 Mo. 340, and cases there cited; *Van Dyne* v. *Vreeland*, 11 N. J. Eq. 370; *Van Dyne* v. *Vreeland*, 12 N. J. 142; *Godine* v. *Kidd*, 19 N. Y. Supp. 337; *Rhodes* v. *Rhodes*, 3 Sandford, Ch. 279; *Jaffee* v. *Jacobson*, 48 Fed. 21; *Sharkey* v. *McDermott*, 91 Mo. 647; *Owens* v. *McNally*, 45 Pac. 711, and many cases there cited; *Brinton* v. *Van Cott*, 33 Pac. 218; *Johnson* v. *Hubbell*, 10 N. J. Eq. 332; *Townsend* v. *Vanderwerker*, 160 U. S. 184; Waterman on Spec. Performance, Par. 41.)

All the statements and declarations referred to were admissible, either to explain ambiguities, or show the relationship existing between plaintiff and her foster parents. (2 Wharton on Ev. Sec. 1158 and cases there cited; 2 Wharton on Ev. Sec. 1091; *Mack* v. *Mack*, 5 N. Y. Sup. Court (T. & C.) 528; *Doty* v. *Wilson*, 47 N. Y. 583; *Granai* v. *Arden*, 10 Johns. 296; *Smith* v. *Maine*, 25 Barb. 33; 1 Greenleaf on Ev. Sec. 147 *et seq.; Mut. Life Ins. Co.* v. *Hillman*, 145 U. S. 295 *et seq.; Beaver* v. *Beaver et al.*, 117 N. Y. 429.)

First: All of the declarations are a part of the *res gestae*. (Section 3126, Code of Civil Procedure; Jones on Evidence, paragragh 350, where it is said: "It is well settled that the main transaction is not necessarily confined to a particular period of time;" *Ranson* v. *Haigh*, 2 Bingham 103, where it is also said: "It is impossible to tie down to time the rule as to declarations; we must judge from all the circumstances of the case;" 1 Greenleaf on Evidence, paragraphs 108–147; *Wormouth* v. *Johnson*, 58 Cal. 623; *Ins. Co.* v. *Mosley*, 8 Wall. 397.)

Second: The declarations are admissible upon the ground that they are made against interest, within the meaning of Section 3129 of the Code of Civil Procedure. (*Van Dyne* v. *Vreeland*, 11 N. J. Eq. 370.) "Declarations of an intestate are admissible against his administrators or any other person claiming in his right." (1 Greenleaf on Evidence, paragraph 189; *Wormouth* v. *Johnson*, *supra; Tait* v. *Hall*, 12 Pac. 391; *Leyson* v. *Davis*, 17 Mont. 236 and 293.)

Third: The evidence is admissible under Section 3131 of the Code of Civil Procedure. The defendants deny the execution of the contract by their answer. To prove, then, that such a contract was entered into, became at once a vital issue in the case. The proof shows, by a half a dozen witnesses, that one of the defendants wrongfully and wickedly destroyed this contract, with the evident intention of defeating, if possible, plaintiff's claim.

PEMBERTON, C. J. The first question presented by this

appeal is as to the jurisdiction of the trial court. Counsel for appellants contend that department II of the district court of Lewis and Clarke county, by the established rules of that court, is the court of probate of said county, and that, having reduced the estate of James M. Smith, deceased, to its possession by issuing letters of administration, and the estate being still in course of administration, that court had exclusive jurisdiction to determine the question of the heirship of the plaintiff. This case was commenced and tried in department I of the district court of said county.

It is claimed that Section 2840, Code of Civil Procedure, gives exclusive jurisdiction to the probate court, or the district court sitting as a court of probate, to hear and determine this cause.

This section, among other things, provides that "any person claiming to be heir to the deceased, or entitled to the distribution in whole or in a part of an estate, may, at any time after the expiration of one year from the issuing of letters testamentary or of administration upon such estate, file a petition in the matter of such estate, praying the court or judge to ascertain and declare the rights of all persons to said estate, and all interests therein, and to whom distribution thereof should be made."

And after requiring the court or judge to give notice of the filing of such petition to the persons interested in the estate, and to take the proper proof of service of such notice, the section further provides that "the court or judge shall thereupon acquire jurisdiction to ascertain and determine the heirship, ownership and interest of all parties in and to the property of said deceased."

In support of the view that the district court, sitting as a court of probate, has exclusive jurisdiction to try and determine the right and title of parties claiming to be heirs of an estate, counsel rely largely upon *In re Burton's Estate*, 93 Cal. 459, 29 Pac. 36. It is claimed that our code is borrowed from California, and that the California construction should prevail here. If we carefully examine *In re Burton's Estate*, we find the

court, after holding that the probate court may try and determine questions of heirship, uses this language in construing the statute quoted above: "But the provisions of the section are carefully limited to the ascertainment and determination of rights and interests claimed in privity with the estates, and are not applicable to rights or titles claimed adversely to such estates."

The question that confronts us here is, does the plaintiff claim to be an heir of the estate of the deceased? Or is not her claim adverse to the estate? She is not an heir at law, nor does she claim under or through an heir of the estate. Whatever claim she has, we think, results and comes to her under and through the contract alleged to have been made with the deceased in his lifetime as set out in her complaint. But whether the plaintiff claims as an heir of the estate, or adversely thereto, we think is not of paramount importance in determining the question of jurisdiction here presented. The section relied upon does not expressly confer exclusive jurisdiction upon the district court, sitting as a court of probate, to try and determine the questions therein enumerated; nor do we think exclusive jurisdiction to do so can be implied from the language of the section.

In discussing this question, Mr. Pomeroy, in section 1153, volume 3, of his work on Equity Jurisprudence, says: "One fundamental principle should be constantly kept in mind. It underlies all particular rules, and furnishes the solution for most of the special questions which can arise. In all those states which have adopted the entire system of equity jurisprudence, whatever be the legislation concerning the powers and functions of the probate courts, and whatever be the nature and extent of the subjects committed to their cognizance, the original equitable jurisdiction over administrations does and must still exist, except so far and with respect to such particulars as it has been abrogated by express prohibitory negative language of the statutes, or by necessary implication from affirmative language conferring exclusive powers upon the probate tribunals. This equitable jurisdiction may be

dormant, but, except so far as thus destroyed by statute, it must continue to exist, concurrent with that held by the courts of probate, ready to be exercised whenever occasion may require or render it expedient. This general principle, so familiar, so fundamental, running through all branches of the equitable jurisdiction, but so often lost sight of by American courts in dealing with the jurisdiction as applied to administrations, was admirably stated by one of the ablest of American judges: 'There is nothing in the nature of jurisdiction, as applied to courts, which renders it exclusive. It is a matter of common experience that two or more courts may have concurrent powers over the same parties and the same subject matter. Jurisdiction is not a right or privilege belonging to the judge, but an authority or power to do justice in a given case, when it is brought before him. There is, I think, no instance in the whole history of the law where the mere grant of jurisdiction to a particular court, without any words of exclusion, has been held to oust any other court of the powers which it before possessed. Creating a new forum with concurrent jurisdiction may have the effect of withdrawing from the courts which before existed a portion of the causes which would otherwise have been brought before them, but it cannot affect the power of the old courts to administer justice when it is demanded at their hands.' "

In a note to this section the author cites a large number of California and other cases in support of the doctrine announced in the section.

Article 8, Section 11, of our Constitution is as follows: "District courts have original jurisdiction in all cases in law and equity where the claim is for fifty dollars or more."

Of the jurisdiction of such constitutional courts of equity, Mr. Beach, at section 1033, in his work on Modern Equity Jurisprudence, says: "The jurisdiction of chancery over decedents' estates is well established, but in the several states of the union special courts having jurisdiction over such estates have been generally established, called 'probate courts,' 'orphans' courts,' 'surrogate courts,' and the like; and these

possess by statute nearly all the powers formerly possessed by the courts of chancery and ecclesiastical courts in England. Courts of equity have, however, concurrent jurisdiction; and, although their equitable jurisdiction may have been displaced in ordinary cases by the probate system, yet it is not abrogated by statutes conferring jurisdiction on probate courts. And it has been held that an act providing that probate judges shall have exclusive original jurisdiction in matters concerning decedents' estates is void, as in contravention of an organic act conferring upon other courts chancery as well as common-law jurisdiction." A great many cases are cited in the notes to this section in support of the views of the author.

We think it cannot be claimed that the district court, as a court of general original common law and equity jurisdiction, did not, at least, have concurrent jurisdiction of this action with the district court sitting as a probate court. The learned judge who presided over the probate department of the district court when this suit was instituted held that the court of probate had no jurisdiction. Whether this view of the matter is right or wrong, it is not necessary now to determine. In the great number of cases reported and cited in the briefs, of the same character as this, we have not discovered that it has been questioned that courts of general chancery jurisdiction were the proper tribunals for trial. *Owens* v. *McNally* (Cal.) 45 Pac. 710, decided by the supreme court of California July 23, 1896, is a case for specific performance of a contract, and is very like this one in its main facts. In that case the general equity jurisdiction of the superior court was not questioned, and this case was decided long after *In re Burton's Estate.*

We deem it unnecessary to examine in detail the great number of authorities cited by counsel, pro and con, upon this question. We think the conclusion that the trial court had jurisdiction of this cause is in harmony with the views of this court expressed in *Chadwick* v. *Chadwick*, 6 Mont. 566, 13 Pac. 385; *State ex rel. Bartlett* v. *Second Judicial District Court*, 18 Mont. 481, 46 Pac. 259; and *In re Higgins' Estate*,

15 Mont. 474, 39 Pac. 506. All these cases define and limit the jurisdiction of district courts sitting as courts of probate.

Counsel for the appellants attacked the complaint in the court below by general demurrer, and now urge in this court that upon the allegations thereof the plaintiff is not entitled to relief. It is urged that, at the time of the execution of the written contract of adoption alleged in the complaint to have been made by and between the mother of plaintiff and the deceased, there was no statute in Montana authorizing the adoption of children, that such contracts were not permissible under the common law, and that, therefore, the plaintiff cannot inherit any part of the deceased's estate, under the facts stated in her complaint.

In answer to this proposition it is manifest that counsel for the plaintiff are not seeking to recover under the written contract of adoption. It is not contended that plaintiff was legally adopted by deceased by such contract. It is contended that the deceased intended thereby to adopt the plaintiff as his child and heir, and thought he had done so, but that, as such contract was not authorized by law, there was in reality no such adoption of plaintiff. But it is further urged on the part of the plaintiff that under the terms of the contract, and allegations of the complaint, it is shown that plaintiff was to receive or have a child's share of the estate of the deceased at his death. It is alleged that plaintiff performed her part of this contract, and that the deceased partly performed his part thereof, but died without having conveyed a child's part of his estate to the plaintiff. It is claimed on the part of plaintiff that, although the contract is invalid as a contract of adoption, it is good and sufficient as a contract to leave the plaintiff a child's share of the deceased's estate at his death. The complaint alleges, in addition to the deceased's agreement to adopt plaintiff, that he "further agreed that on his death she should receive a child's share of his said estate." The question then is, will a court of equity enforce this part of the contract if it shall be satisfactorily proved?

In *Jaffee* v. *Jacobson*, 1 C. C. A. 11, 48 Fed. 21, the court,

discussing this question, says: "We concede the law to be that a court of equity will specifically enforce a promise to leave to another the whole or a definite portion of one's estate, as a reward for peculiar personal services rendered or other acts done by the promisee, which are not susceptible of a money valuation, and were not intended to be paid for in money, provided the consideration has been substantially received at the promisor's death; and it is no objection to the enforcement of such a contract that it was entered into with a third party for the promisee's benefit, if the latter has acted under it and executed it. Such seems to be the substance of the rule fairly deducible from the authorities cited and relied upon by appellant's counsel. (*Rhodes* v. *Rhodes*, 3 Sandf. Ch. 279; *Van Dyne* v. *Vreeland*, 11 N. J. Eq. 371; *Sutton* v. *Hayden*, 62 Mo. 102; *Sharkey* v. *McDermott*, 91 Mo. 648, 4 S. W. 107; *Haines* v. *Haines*, 6 Md. 435; Pomeroy Cont. Sec. 114, and citations.)" In *Godine* v. *Kidd*, 19 N. Y. Supp. 335,—a case almost exactly like the one at bar, especially in the particular that the adoption of a child was attempted in the absence of a statute authorizing it,—the court said: "Even though we should assume, therefore, that none of the arrangements between the parties was of original binding obligation upon the defendant's parents, yet the subsequent performance aud fulfillment thereof by defendant and her parents, so that thereby the Knapps actually got all they bargained for, would furnish a sufficient consideration to support their promises as effectually as if the agreement had been of original binding obligation. What the Knapps bargained for was, at the very least, forbearance by and on the part of defendant's parents of some of their rights, and was an adequate and sufficient consideration for their promises and undertakings. * * * The adequacy of the consideration is for the parties to consider at the time of making the agreement,—not for the court when it is sought to be enforced. Here, with the consent of the defendant's parents, the Knapps obtained the privilege of supervising and directing the defendant's education, her life, habits, and tastes, the formation

and development of her character, and the privilege of treating her as their own daughter, and of being regarded and loved by her as her parents. They at the time were childless, and were, no doubt, actuated by the same feelings and instincts which ordinarily move lonely and childless people to adopt as their own the child of others; and that there was resultant benefit to them is abundantly established by the evidence. The defendant not only regarded them as her parents, but in all respects conformed to the strictest requirements of an affectionate and dutiful child. Upon these facts, who would question the worth, adequacy, and sufficiency of the consideration received by the adopting parents? Lives that are drear and blank are thus oftentimes cheered and animated, and filled with new hopes and ambitions, fresh impulses, and awakened energies. These are the contributions of youthful love and affection and companionship to childless old age. But, whether or not the results expected from adopting the defendant were in all respects realized, this in no way affects the adequacy of the consideration moving from the parents of the defendant, and supporting the promise made by the Knapps."

In *Sharkey* v. *McDermott*, 91 Mo. 647, 4 S. W. 107, the plaintiff, when a child, was given by her mother, a widow, to James and Catharine McLaughlin, under an agreement that the McLaughlins would care for her and adopt her as their child, "and leave her their property at their death." They neglected to formally adopt the plaintiff. James McLaughlin willed all his property to Catharine, and died. Catharine died suddenly, leaving no will. The plaintiff sued the heirs at law of Catharine McLaughlin for a specific performance of the contract made with the McLaughlins. In this case, speaking of that part of the contract of the McLaughlins to leave the plaintiff their property at their death, the court said: "But the rights of plaintiff, if any, in this case, do not spring either from the general law applicable to parent and child, or from said statute authorizing the adoption of children, for the reason that plaintiff was not the daughter of these parties by nature, nor had she been formally adopted by them by deed duly

executed as the statute requires. Her rights in the premises, if any, depend, we think, entirely upon said agreement, and the action had thereunder by the parties thereto. This agreement was not merely and solely one to adopt the plaintiff, but was in part to leave the plaintiff the property at their death. The fact that the parties, and each of them, may have failed and neglected to execute it, so far as the adoption was concerned, should not, we think, exonerate them from its further obligation to transfer their property, when they could no longer use it, to plaintiff; but if the plaintiff is without the status of an adopted child, through no fault of her own, but through the neglect of those so promising, this is only additional ground for the enforcement of the contract as to the disposition of the property, if the necessary equitable facts and circumstances are properly alleged."

In *Healey* v. *Simpson*, 113 Mo. 340, 20 S. W. 881, the court held that where a written contract for the adoption of a child is invalid because not executed in conformity with the law of the state, yet where such contract also provided that the child should have and inherit from the estate of the promisors in the same manner and to the same extent that a child born of their union would inherit, such part of the contract would be specifically enforced in favor of the heirs of the promisee against the heirs of the promisors. In this case the court cites a large number of authorities, and sums up its views in the following forcible language: "The surrender by the mother of all control of the child, and the services and companionship of the latter, constituted valuable considerations for the promise of Brewster and his wife that she should 'have and inherit from the estate of said parties * * * in the same manner and to the same extent that a child born of their union would inherit.' The influences of a child of tender years in the home circle are too sacred and holy to be estimated in dollars and cents. And, when the mother sent her child to dwell in another family in a distant state, she yielded much affection and love; and Brewster by the same act gained the companionship of one who added much, no doubt, to his

enjoyment of life. The sundering of natural ties, and the formation of artificial ones, for the enjoyment and gratification of the party at whose instance this is done, is held, and ought to be held, to be such a consideration as the courts will recognize as valuable, where the other party has in good faith acted on and carried out the agreement on his part. This is upon the principle that the parties cannot be put in *statu quo*. In the very nature of things, nine years in the life of a child so change conditions that it is out of the power of an earthly tribunal to restore the parties to their original situation and environment, and the courts therefore compel them to stand upon and abide by the record they have made."

In *Owens* v. *McNally* 45 Pac. 710 (Cal.), the supreme court of California hold that "a parol contract by decedent to leave plaintiff all his property, real and personal, if she would leave her home, and thereafter 'live with him and care for him,' is not so vague and uncertain as to preclude specific performance in an ordinary case."

In this case the court adopts with approval the following language of the supreme court of New Jersey, found in the leading case of *Johnson* v. *Hubbell*, 10 N. J. Eq. 332: "There can be no doubt but that a person may make a valid agreement binding himself legally to make a particular disposition of his property by last will and testament. The law permits a man to dispose of his own property at his pleasure, and no good reason can be assigned why he may not make a legal agreement to dispose of his property to a particular individual, or for a particular purpose, as well by will as by conveyance, to be made at some specified future period, or upon the happening of some future event. It may be unwise for a man to embarrass himself as to the final disposition of his property, but he is the disposer by law of his own fortune, and the sole and best judge as to the manner and time of disposing of it. A court of equity will decree a specific performance of such an agreement, upon the recognized principles by which it is governed in this branch of its jurisdiction."

This case collates what the court calls a "multitude of au-

thorities,'' and, after considering them thoroughly, the conclusion is reached that the rule announced "is supported by the overwhelming weight of authority.''

In most of the cases quoted above the promisors attempted in some manner to defeat the contracts entered into by them, and the courts, notwithstanding, enforced them—in several instances against the heirs and assignees of the promisors. In this respect the case at bar, as stated in the complaint, is a stronger one than any case cited above; for, as far as the allegations of the complaint are concerned, or any inference therefrom, the promisor in this case never in his lifetime sought to evade or defeat the contract it is alleged he made with, or for the benefit of, the plaintiff, but, as far as can be inferred, even from the complaint, died believing he had, by a proper contract, adopted the plaintiff, and contracted therein to leave her a child's share of his estate at his death; so that we are of the opinion that the contract on the part of the deceased to leave to the plaintiff a child's share of his estate is sufficiently alleged in the complaint, and that such contract should be enforced, if sufficiently established by the proof. We come to this conclusion more readily as we are of the opinion that the parties to the alleged contract never contemplated that the services of plaintiff were to be or could be compensated in money, and because the parties cannot now be placed in *statu quo*. Besides, there are no intervening rights of third parties or innocent holders of the estate involved. There is nothing harsh or hurtful to anyone in such proceeding. No fraud or imposition is alleged, or hinted at, even, in the record. So that if the contract as alleged is clearly established, as we think it must be, it should, in equity, under the great weight of authority, be enforced. (*Van Dyne* v. *Vreeland*, 11 N. J. Eq. 370; *Brinton* v. *Van Cott*, 33 Pac. (Utah), 218; *Townsend* v. *Vanderwerker*, 160 U. S. 184, 16 Sup. Ct. 258; *Pflugar* v. *Pultz*, 43 N. J. Eq. 440, 11 Atl. 123.)

Is the contract to leave to the plaintiff a child's share of the estate of deceased at his death sufficiently established by the evidence to authorize a court of equity to decree a specific per-

formance thereof? Mr. Foot, an insurance agent, drew the contract. He is not certain, but thinks there was something in the contract about making plaintiff Smith's heir. He has no positive recollection as to whether the contract provided that she should inherit as Smith's own child. He knows that Smith wanted a contract showing his intention to adopt plaintiff. The mother of the plaintiff testifies positively that the contract did contain the provision that plaintiff should have a share of his estate at the death of Smith, as his child—his only child. She says Mr. Foot read the contract over to her twice after it had been signed by the Smiths. We see no such conflict as is contended for between the evidence of these two witnesses. Mr. Foot does not recollect as distinctly as the mother. He does not contradict her. It is not strange that his memory should not be as good as the mother's in respect to the provisions of this contract. He was perhaps in the habit of drawing contracts for people. It is fair to suppose the mother was not. Mr. Foot had no particular reason for remembering the terms of this contract. The mother did. It was to her, perhaps, the most important document she ever executed. It concerned immediately the welfare and happiness of her daughter. It is not strange, then, that the terms of this contract, which was to influence so largely the happiness and destiny of her daughter, should make a deep and lasting impression on her mind. And, besides, if, as Mr. Foot says, Mr. Smith wanted a contract written showing his intention to adopt plaintiff, it is fair to presume that the contract, as prepared, did contain something about making plaintiff his heir, or providing that she should have a child's share of his estate at his death. Such would have been the effect of a legal adoption. From Mr. Foot's evidence, Smith wanted and intended to legally adopt plaintiff. But, if any real conflict existed between these two witnesses, let us look further at the evidence. This written contract, as shown by the record, has been lost or destroyed. It is shown by the neighbors of the Smiths—very many of them—in substance, that deceased dearly loved the plaintiff. He spoke of her to some as his

heir—as his adopted daughter. He introduced her to others as his daughter. He so treated and cared for her for years. Then, when she was to be married, he insisted it must be at his house. She married with his consent and approval. She received his blessing as if his own child. He gave to her a home as a man would to his own daughter. When plaintiff's child was born, the deceased congratulated and felicitated himself upon the happy event of being a grandfather. And it seems that in a biographical sketch of Mr. Smith, published in the history of Montana, he states that he had adopted plaintiff. From all the declarations and acts of the deceased, as shown by the record, it seems clear to our minds that deceased not only intended to make such a contract as would permit the plaintiff at his death to have a child's share of his estate, but that he did make such contract. The record shows that the deceased entertained great affection for the plaintiff. She occupied perhaps a closer relation and position to his heart, in his old and childless days, than any other person on earth. It is not to be wondered at, then, that he should desire to make suitable provision for her happiness and maintenance. A jury has found that he did make such a contract as would carry out his intention and desire in this respect. Hon. Henry N. Blake, the judge who tried the case, approved the findings of the jury in this respect, as well as in every issue submitted to them. Hon. Henry C. Smith, the successor in office of Judge Blake, heard the motion for a new trial, and overruled it; holding, in an ably-written opinion, that the contract in question was clearly established by the proof. After the finding of this issue in favor of the plaintiff by the jury, and the action of two chancellors in adopting and approving such finding as clearly established by the proof, we must hesitate to disturb and reverse such action and result. We think such disposition of the case is but the carrying out of the cherished intention and desire and contract of the deceased in relation to his estate. The deceased had the right to dispose of his property as he pleased, and his contract to dispose of it, when free from fraud, imposition, and surprise, and being reasonable and

moral, will be carried out and enforced by a court of equity. This is equity. This is right. It is real justice to carry out and enforce such contracts according to the intention of the parties in such cases. (*Leyson* v. *Davis*, 17 Mont. 220, 42 Pac. 775.)

Counsel for appellants contend that the evidence of the witnesses as to the acts and declarations of deceased with reference to the relation plaintiff sustained towards him while living in his family were inadmissible. We think the *res gestae* extended over the entire time between July, 1885, when the contract is alleged to have been made, to the death of the deceased. The conduct of the parties towards each other during that entire time is part of the transaction, and whatever either party did or said during that time which sheds light upon the matter, and aids in disclosing the relations the parties sustained, and understood that they sustained, towards each other, must be construed as part of the *res gestae*. We think this evidence was admissible, under Section 3126, Code of Civil Procedure, which is as follows: "Where also the declaration, act or omission, forms part of a transaction which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission is part of the transaction." In nearly all of the cases cited and quoted above, in cases like this, the acts and declarations of the parties explanatory of their relations towards each other, and disclosing and explaining the conditions, terms, and contracts supporting these relations, have been admitted in evidence.

Counsel for appellants say plaintiff abandoned the performance of her part of the contract with the deceased, or did not sufficiently perform the same to authorize a decree of specific performance. It is also claimed that plaintiff did not yield that obedience to the Smiths that the contract relied on demanded of her.

It is in evidence that on one or more occasions the plaintiff left the home of the Smiths, and on one occasion remained away some time. It is in evidence that plaintiff and Mrs. Smith did not always agree and get along harmoniously. Mr.

Smith, it seems, was aware of this, and regretted it. It is not necessary for us to discuss the question as to who was at fault —the child or Mrs. Smith. It is in evidence that Mr. Smith on one of these occasions went after plaintiff, and brought her home; saying at the time he would have her back if it cost him half of his property. The evidence of some of the witnesses is to the effect that Mr. Smith was grieved that his wife and plaintiff sometimes disagreed. But we agree, in relation to these questions of nonperformance of the contract and want of proper obedience on the part of plaintiff, with Judge Smith in his able opinion overruling appellants' motion for a new trial, that these were matters of which Mr. James M. Smith was the sole judge. Smith had no intention on account of these things to rescind the contract. Long after the absences of plaintiff from Smith's home, which are urged as showing an abandonment or nonperformance of the contract on the part of plaintiff, she lived at the Smith home, treated and regarded as a daughter by Smith, without any intimation on his part that he was dissatisfied, or intended to rescind the contract, and so lived there, treated as Smith's child, until her marriage.

We believe we have substantially treated, if not in detail, all the questions presented by this appeal. Some minor matters, such as who destroyed the contract, whether deceased left a will, and whether plaintiff was driven from the Smith home by ill treatment of Mrs. Smith, we think immaterial. We think that it is sufficiently alleged in the complaint, and established by the proof, that deceased contracted to leave plaintiff a child's share of his estate at his death—conditioned, of course, upon her performing the contract on her part. We think it is shown that she did perform the contract to the satisfaction of the deceased, the sole judge of those matters. We believe it was the desire and intention of the deceased that the plaintiff should have a child's share of his estate at his death, and that he contracted, and intended to contract, to that effect. We see no reason why, under the facts and circumstances of this case, the wishes and contract of the deceased in

the premises should not, equitably, and in justice to all parties interested, be carried out and enforced.

The judgment, decree, and order appealed from are affirmed.

Affirmed.

HUNT and PIGOTT, JJ., concur.

21	277
21	518
21	277
22	265
21	277
24	279
24	466
24	468
24	539
21	277
26	84
21	277
27	20
27	57
21	277
28	92
28	370
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29	488
21	277
f32	130
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f33	266
21	277
36	55

J. R. SANFORD, RESPONDENT, v. GATES, TOWNSEND & CO. AND FLORENCE K. GATES, APPELLANTS.

[Submitted May 23, 1898. Decided July 5, 1898.]

Conditional Sales—Remedy—Contract—Rescission—Reformation—Remedy—Equitable Defense—Findings by Court.

1. CONDITIONAL SALES—*Remedy.*—The predecessor in interest of the defendants agreed, in writing, with the plaintiff, that he had hired of plaintiff certain personal property, for which he agreed to pay the sum of $649 as rent, as follows: $50 per month until the full amount with interest should be paid. It was further provided in the agreement that the title should not pass until the sum above mentioned had been paid, that in case of default in payment plaintiff might take possession of the property, and that all money theretofore paid should be forfeited as damages for the use of the property. *Held*, that, upon default in payment, plaintiff was entitled to the possession of the property.
2. RESCISSION OF CONTRACT.—A party to a contract cannot have a rescission thereof, unless he offers to return all that he has received thereunder, or shows some valid excuse for his failure so to do.
3. CONTRACT—*Reformation of.*—A contract which does not express the true intention of the parties, may be reformed at the request of a party thereto who, although he understood the terms thereof, was led to sign it by the fraudulent misrepresentations of the other party upon which he relied.
4. SAME—*Remedy.*—A party to a written contract who claims that it does not correctly state the true terms of the agreement, and that he was led to sign the same by the fraudulent misrepresentations of the other party thereto, cannot recover upon the oral agreement, but must first have the written agreement reformed; recovery cannot be had upon an oral agreement differing in its terms from the written evidence of it made by the parties.
5. SAME.—To warrant the reformation of a contract because of deceit by means of false representations, it must appear that the party seeking the reformation was induced by the false representations to enter into the contract.
6. EQUITABLE DEFENSE—*Finding by Court.*—Where an equitable defense is interposed, the court has the power and jurisdiction of a chancellor, and may submit issues of fact to the jury, or may refuse to do so, and direct a verdict even where the evidence is conflicting.

Appeal from District Court, Lewis and Clarke County; H. R. Buck, Judge.

REPLEVIN by J. R. Sanford against Gates, Townsend & Co. and another. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Toole & Wallace, for Appellants.

T. J. Walsh, for Respondent.

PIGOTT, J. The complaint alleges, in substance, that the plaintiff is the owner and entitled to the possession of certain hotel furniture of the value of $649.06; that the same is unlawfully held by defendants, after demand therefor; that on October 2, 1893, plaintiff delivered the chattels in controversy to defendant Gates, Townsend & Co., a corporation, under the provisions of a contract entered into on that day between plaintiff and defendant corporation, as follows:

"Helena, Montana, Oct. 2, 1893. I have this day rented of J. R. Sanford the following described goods as per memorandum attached, for which I agree to pay him as rental $649.06 as follows, viz.: Fifty dollars on the first of each month until the whole amount of $649.06 is paid, together with interest at 1 per cent. per month on all unpaid balances; the interest to be paid monthly. And it is further expressly understood and agreed that the title to the above described goods shall not pass to me until I have paid an amount of rental equal to $649.06, as herein provided; and that the same shall be and remain the property of the said J. R. Sanford until the same shall be fully paid. And in case I make a default in my payments, as herein provided for, or any part thereof, I hereby grant and give to said J. R. Sanford or his agent or employee the right and privilege to enter on my premises and into my house or place where the goods may be, and take possession of said goods without process of law. In case I make default in said payments, or any part thereof, it is expressly agreed and understood that all sums paid by me prior to such default shall be, and the same is hereby, forfeited as a part of the damages sustained by said J. R. Sanford for the use of the goods belonging to said J. R. Sanford,

in the event of my failure to perform the terms of this agreement. And I further agree that I will not remove the goods, or allow them to be removed, from the street and number as herein given, without the consent of the said J. R. Sanford. If so, I agree to forfeit all that has been paid on them, and return the goods to J. R. Sanford or his agent. When the amount herein specified shall have been fully paid, with interest as agreed upon, then the said J. R. Sanford shall, if required, give a bill of sale for the goods herein mentioned. [Signed] Gates, Townsend & Co., per A. R. Gates, Pres. Payments on above contract to commence in the month of January, 1894. J. R. Sanford."

That afterwards the defendant assigned to its co-defendant all its interest in the property. That on September 2, 1894, there fell due as interest $2.50, which remains unpaid, and that on October 2, 1894, the sum of $50, with further accrued interest of $2.50, became due, and was not paid. That there was due and unpaid October 4, 1894, when the complaint was filed, the sum of $55, and that the additional sum of $150 had not then matured.

The answer admits that the chattels were delivered and received in pursuance of the contract set out in the complaint. For an equitable defense defendants plead that at and before the making of said contract one Rohrbaugh was renting from defendant corporation the Grandon Hotel, and had possession of and was using the chattels as part of the furniture of the hotel under some agreement with plaintiff, the terms of which were unknown to the defendants, that Rohrbaugh was then indebted to defendant company to the extent of $1,800 or thereabouts, and was insolvent, and unable to pay any part of such debt, except by a transfer of his interest in the said chattels, and that there was then due, or to become due, from Rohrbaugh to plaintiff, the sum of $449.06—all of which plaintiff knew; that defendant company agreed to execute a contract in writing to pay plaintiff whatever was due, or to be paid by Rohrbaugh to plaintiff for the chattels, and thus become the owner thereof; that plaintiff and Rohrbaugh conspired to-

gether to defraud and cheat the company, and to carry out their wicked purpose fraudulently represented to the said defendant that there was due and to fall due from Rohrbaugh to plaintiff the sum of $649.06, instead of the real sum of $449.06, which latter was the amount defendant of right ought to pay to obtain title to the property; that the defendant company relied upon said fraudulent and false representations, and believed them to be true, and had no information or means of information to the contrary, and that it therefore executed the contract to pay $649.06, whereas, the amount should, in truth and fact, have been $449.06. It is further averred that defendants, before the commencement of this action, had paid in full the $449.06, which was the whole amount payable by Rohrbaugh, and that by reason of the said payment they are entitled to the property. They pray that the contract pleaded in the complaint be declared void; that an accounting be had according to the agreement of the parties; that the defendants be decreed the owners and rightfully in the possession of the property; that if, on an accounting, anything be found due the plaintiff, defendants be permitted to pay the same into court, which they offer to do; and ask for general relief. No issue was made as to value. For convenience we shall, in this opinion, treat the company as the only defendant.

The defendant, upon whom rested the burden of proof, introduced evidence. Plaintiff then moved the court to direct the jury to find for plaintiff on several grounds, one being that defendant had failed to show that it had relied upon or believed the false representations made by plaintiff to it; and another being that there was no evidence that the amount due from Rohrbaugh had been paid. The motion was granted upon the first ground mentioned, a verdict returned, and a judgment signed and entered accordingly. From the judgment, and from an order refusing a new trial, defendant appeals.

With two exceptions, every material allegation of the equitable defense was, *prima facie*, clearly established. The evidence disclosed that $12 or thereabouts were still unpaid on the

contract between plaintiff and Rohrbaugh, this deficiency being occasioned by an erroneous calculation of the interest. This is one of the exceptions. The other is the allegation that the defendant believed the false representations of plaintiff, and relied upon them at the time he entered into the contract with him.

The following quotations are extracts from the testimony of Gates, president and managing officer of defendant: "I was to pay for this furniture just what balance Rohrbaugh owed Sanford. Sanford said all he wanted was his pay for this furniture. I then entered into the contract sued on. Plaintiff had made out before that time, and given me, a statement of Rohrbaugh's account. He said this was the amount due." Witness produced itemized bill, showing $649.06 as due from Rohrbaugh to plaintiff. "I have had this account in my possession ever since. I went to plaintiff, and told him I did not think that account was right, and I would like to see his books, as I had assumed the balance Rohrbaugh owed him. He informed me that he would not let me see the books; he would not let any man see his books, he did not care who he was. I had no other means of knowing, except through the statements of Rohrbaugh and Sanford, what amount was due.' Question: 'Did you accept the statement as true, and act upon it?' Answer: 'I accepted it under protest. I told Sanford I didn't think the account was right. I says, 'There have been other payments made.' 'Well,' says he, 'if there has been any other payments made on that account, Adam (meaning his clerk) got it. I never got it.' This was at the time he refused to permit me to look at his books. I asked Sanford how much Rohrbaugh owed him. He said he couldn't tell until he had looked up his account. Said I, 'Did he keep up the payments? 'Yes,' he said, 'he did promptly; very good; better than I expected.' That afternoon Sanford came to the hotel with the statement given in evidence. I looked at it and says: 'That can't be right. You told me he kept up his payments very well.' I says, 'This shows no payments made since the 1st of May,' and I says, 'Rohrbaugh told me he had

kept up his payments, and that was one reason why he could not pay his rent—he had to pay so much for furniture.' 'Well,' he says, 'if there has been anything more than that paid, Adam got it. I never got a cent.' I objected. I did not like to pay that amount. * * * I said, 'Whatever is due legally, I am willing to pay; but I don't want to pay any more.' Then he said, 'You just sign this contract, and if we find there is anything wrong, or anything paid in outside of this, we will rectify it in the end.' I immediately signed the contract. Rohrbaugh had previously stated to me that there was about $400 due on it. I do not know where Rohrbaugh was at the time of this conversation with Sanford. Mr. Sanford at that time would not permit me to see his books, and insisted upon my signing the contract exactly as it was. He says, 'You sign this.' * * * The statement given me originally by Sanford showed a balance of $673.97, but there was an item of interest included, amounting to $24.87, which Sanford deducted, leaving a balance of $649.06. I looked it over, and saw there was interest charged up twice, as I supposed, and Sanford made the correction." He further testified that he was satisfied at the time he signed the contract that $649.06 was not the correct amount owing by Rohrbaugh to plaintiff, and that he signed the contract under protest. Again, he said: "I had suspicions from the very first time that Sanford brought the contract up. I suspicioned that it was not right, but I didn't know how I could get at it to find out anything then, as I couldn't see the books." Some three weeks after the contract was made, the secretary of the company wrote to witness, who was then in Chicago. "I learned from this letter that the statement made me (by Sanford) was incorrect, and that Rohrbaugh didn't owe him any such amount. The letter did not give me the source of information, and I returned here again in January following, and when I got back Kepner (the secretary) and myself talked the matter over, and this was the time I went to Sanford to see his books. He had always refused to let me see them."

On April 1, 1894, defendant began making the payments

required by the contract. On June 1st the unpaid balance of the $649.06 was $399.07. Defendant paid $53.99, and wrote the following receipt, which plaintiff signed: "June 1, 1894. Gates, Townsend & Co. to John R. Sanford, Dr. June Int. on $399.07, $3.99; June installment, $50.00—$53.99. Paid. J. R. Sanford."

On July 1st there was unpaid of the $649.06 the sum of $349. Defendant then paid $53.49, and took from plaintiff a receipt showing that $50 was for the July installment and the $3.49 for interest. This receipt also was written by the witness. The last payment was made September 5, 1894. "Up to the time I refused these payments, I had a suspicion that this amount was not correct. I never knew, but I suspicioned that it was not right, and for the purpose of investigating it I refused to pay these last payments. * * * The first time I became fully satisfied of it was after the books had been examined." After plaintiff moved the court to instruct the jury to find for him, the court permitted the witness to be recalled. He then testified that just before the contract was signed he asked Rohrbaugh what was due, and Rohrbaugh said, "Not far from $400." "Then, when the contract was presented to me, it was so much larger than what had been represented to me, I was suspicious that there was something wrong, and afterwards was satisfied that it must be right, and signed it. This occurred from my conversations with Sanford. Afterwards so many things came to my mind that the thing was not right, and that I was being swindled out of some money, I thought I would contest it, and see what there was in it. I told Sanford every time we met that I would like to see the accounts. I asked him every time I saw him that I would like to see the books. I think I told him before signing the contract that I wanted to see his books. I asked him a great many times. I did not see them. He would not let me."

1. The contract upon which the action is based is attacked as unconscionable, because it provides that, if the company fails to make any of its payments, all sums paid prior to default shall be forfeited as part of the damages for the use of

the goods, and the goods shall be returned to the plaintiff. Whether or not the courts will enforce the forfeiture clause with respect to the payments made is not a question presented upon this appeal. The contract expressly confers upon plaintiff the right to take the chattels upon default of defendant. We do not think that this right is subject to a settlement with the defendant with respect to such payments. When the purchaser or bailee fails to make the payments required by the contract, the seller or bailor may, in replevin, recover possession of the chattels. (*Puffer* v. *Reeve*, 35 Hun. 480; *Ballard* v. *Burgett*, 40 N. Y. 314; *Austin* v. *Dye*, 46 N. Y. 500: *Thirlby* v. *Rainbow* (Mich.) 53 N. W. Rep. 159; *Ryan* v. *Wayson* (Mich.) 66 N. W. Rep. 370. This conclusion is supported by the rulings in *Heinbockle* v. *Zugbaum*, 5 Mont 344, 5 Pac. 879; *Silver Bow M. & M. Co.* v. *Lowry*, 6 Mont. 288, 12 Pac. 652, and *Miles* v. *Edsall*, 7 Mont. 185, 14 Pac. 701.)

2. That the defense interposed by the answer is equitable in its nature is conceded by the parties. Although defendant asks the court to declare the contract null and void, the failure to offer a return of the goods obtained under it, or to give an excuse for the omission to do so, renders the defense pleaded unavailing for purposes of rescission. Indeed, relief by rescission would not benefit defendant, for the title to the goods was in plaintiff when the contract was made. His title does not come from or depend on the contract. If the contract were declared void, the chattels would go to plaintiff, and defendant might have an action to recover whatever he has paid for them. So, if the contract were rescinded, plaintiff must necessarily recover possession of the property.

The plaintiff urges that the complaint does not state facts which would, if proved, authorize a reformation of the contract, for the reason that defendant knew exactly what the language and import of the writing was, and that, therefore, there was no mistake, induced by fraud or otherwise, as to the terms and conditions of the contract, and hence the writing must stand as the only evidence of the only contract that was entered into. This view of the jurisdiction of equity is too

narrow. In our opinion, the answer states facts sufficient, if proved, to warrant the remedy of reformation. True, the written contract was fully understood by defendant at the time. It intended to sign just the paper it did sign. But this willingness of defendant was, it is alleged, brought about by the fraudulent misrepresentations of plaintiff upon which the defendant relied. The defendant alleges that the real contract between the parties was that defendant should pay the plaintiff whatever was owing by Rohrbaugh to plaintiff, and that $449.06 was the amount of the debt. The court will look beyond the question whether the party knew and understood the words employed to the true intention of the parties when they agreed upon the words. "If the instrument does not express the true intention, although there was no slip of the pen or mistake made in merely writing words, the instrument will be reformed." (*Dunn* v. *O'Mara*, 70 Ill. App. 609.) In the case of *Graham* v. *Guinn* (Tenn.) 43 S. W. 749, the court said: "But this state of willingness upon the part of the complainant was superinduced by the fraudulent statement of the defendant that these figures represented one-half of the value of the property agreed upon as a basis of the contract—that is, one-half of what defendant had agreed to give Barrett—together with one-half of the expense of moving the plant. Under the authorities above cited, and on principle, we think there is no doubt that the complainant is entitled to a reformation."

Defendant claims that the real contract was that it was to pay $449.06, instead of $649.06, as stated in the contract sued on, and that it was induced to sign the latter by fraudulent representations. The relief which it seeks is reformation, so that $449.06 shall take the place of $649.06, and then the enforcement of the contract as reformed. This is evidently the view taken by the court on the former appeal. (See *Sanford* v. *Gates*, 18 Mont. 398, 45 Pac. 559.) As suggested by respondent's counsel, this court did not intend to say that, if a written contract be entered into, and by the fraud of one of the parties it fails to express the true agreement, the writ-

ten instrument is to be disregarded, and recovery had upon oral proof of the real agreement. The agreement must not be confounded with the written evidence of it. Upon certain conditions the agreement may be repudiated, and rescinded for fraud; but, if any rights are claimed thereunder, the written instrument is the only evidence of the terms of that agreement. If by fraud the writing speaks falsely, it must be reformed; recovery cannot be had upon an oral agreement differing in its terms from the written evidence of it made by the parties. These remarks do not apply to, nor are we considering, a case where an oral contract is made, and, instead of the contract being reduced to writing, as the parties contemplated, there is fraud touching the execution of the instrument, such as misreading, the surreptitious substitution of one paper for another, or obtaining by some trick or device an instrument which the party did not intend to give. (*George* v. *Tate*, 102 U. S. 564.) In such cases it may be that reformation is not prerequisite to recovery on the actual contract, for the reason that the written instrument was not intended to be made.

Defendant complains that the question whether the false representations of plaintiff induced it to make the contract should have been submitted to the jury. Learned counsel insists that the defendant was deprived of a constitutional, legal, and sacred right by the action of the trial court in refusing to permit the jury to pass upon that question of fact. The defense was equitable. Where an equitable defense is interposed, the court exercises the power and jurisdiction of a chancellor, and may or may not, according to its discretion, order issues to a jury. If the remedy sought be equitable, the court is not bound to call a jury, and, if it does call one, it is only for the purpose of enlightening its conscience, and not to control its judgment. The decree which it must render upon the law and the facts must proceed from its own judgment respecting them, and not from the judgment of others. (*Gallagher* v. *Basey*, 1 Mont. 457; *Basey* v. *Gallagher*, 20 Wall. 670.) The court must determine the issues

for itself, and therefore the court may direct a verdict, though the evidence be conflicting. This conclusion inevitably follows from the doctrine announced in *Basey* v. *Gallagher*, *supra; Fabian* v. *Collins*, 3 Mont. 215; *Mantle* v. *Noyes*, 5 Mont. 274, 5 Pac. 856; *Beck* v. *Beck*, 6 Mont. 318, 12 Pac. 694; *Arnold* v. *Sinclair*, 12 Mont. 277, 29 Pac. 1124; *Leggatt* v. *Leggatt*, 13 Mont. 190, 33 Pac. 5; *Kleinschmidt* v. *Greiser*, 14 Mont. 494, 37 Pac. 5; *Zickler* v. *Deegan*, 16 Mont. 198, 40 Pac. 410; and the rule is well expressed in *Galvin* v. *Palmer*, 113 Cal. 46, 45 Pac. 172. In that case the jury had rendered a verdict by direction of the court below, and judgment was entered in accordance therewith. The court say: "While it is true that in actions at law, where a trial by jury is a matter of right to either party, it is error for the court to instruct the jury to render its verdict for one or the other when the evidence is conflicting, the rule does not obtain where, in equity, a jury is impaneled merely as a body advisory to the court, to assist it in determining disputed facts. In such cases the court may, even under conflicting evidence, reject the verdicts, general or special, of the jury, and enter a decree in accordance with its own determination, or, what is an equivalent, it may direct a particular verdict upon the facts as being in accord with its own conclusions. There was no error, therefore, in the court's instruction, even if it be conceded that the evidence was conflicting." Unless, as a matter of law, the evidence was such as to require a finding for defendant, it cannot successfully complain of the action of the court in directing a verdict in conformity with its own views of the effect of the evidence; in other words, if defendant was entitled, upon the evidence adduced, to a decision establishing the truth of its defense, then the instruction was erroneous, but not otherwise. It was not so entitled if a substantial conflict existed as to any material averment of the defense.

To warrant reformation on the ground of deceit by means of false representation, it is essential that the false representation induced the party asking such relief to enter into the con-

tract sought to be reformed. He must have believed it to be true, and acted on the faith of it. In the absence of such belief and resultant action, he was not deceived. Such is the rule in all cases at law and in equity where the action or defense is founded upon fraud alleged to have been accomplished by means of false representations. (*Farrar* v. *Churchill*, 135 U. S. 615, 10 Sup. Ct. 771; *Humphrey* v. *Merriam*, 32 Minn. 197, 20 N. W. 138; 2 Beach Mod. Eq. Jur. Sec. 85; *Taylor* v. *Guest*, 58 N. Y. 262; Bigelow on Fraud, page 64.)

The court below had the advantage, not possessed by this court, of hearing the testimony orally delivered by the witness Gates, and of observing his demeanor and manner of testifying. The court found that defendant did not believe the false representations to be true when it entered into the contract. Gates was the president and managing officer of defendant. He alone represented it in all matters pertaining to the contract with plaintiff. The important question was, did he believe the false representations to be true, and act on them? Was he deceived by plaintiff? As presented in the record, his testimony is not without uncertainty, and self-contradiction. He testified that he was suspicious from the very first that plaintiff had fraudulently swelled the account against Rohrbaugh; that plaintiff always refused to permit an inspection of his books; that he was satisfied at the time he signed the contract that the amount stated was incorrect; that he accepted plaintiff's assurance, and signed the contract under protest. Eight and nine months afterwards he made payments on the contract, expressly recognizing its validity by preparing and accepting receipts for interest paid by him on the remainder of the $649.06. When recalled after plaintiff had argued the motion to direct the jury, Gates testified that he became satisfied from his conversations with plaintiff that the amount, $649.06, was correct, and that he then signed the agreement. The burden of proof, in both of the senses in which the term is used, rested upon the defendant, and the court found from the testimony of the managing officer of defendant that he did not believe the representation of plaintiff

to be true. The trial court was the exclusive judge of the credibility of the witness and of the weight of his evidence. The evidence would warrant a finding to the contrary; that is to say, there was evidence tending to prove that defendant believed the false representation to be true. There was also evidence, presented by the testimony of Gates, having a strong tendency to show disbelief and nonreliance. To pass upon this conflict was the province of the trial court, and a duty peculiarly confided to it. We cannot disturb its finding without disregarding a well-established and familiar principle.

The contemporaneous oral promise said to have been made by Sanford, to the effect that he would rectify any mistake in the amount, while it was evidence tending to prove fraud, may not be imported into the written contract, for the reason that it was not intended by the parties to be incorporated into that agreement; nor can the defendant be permitted to set up that he signed the contract in reliance upon an oral agreement, made at the time, relating to the subject of the contract, and qualifying or varying the instrument which he signed. Where there is no fraud or mistake in the preparation of the instrument, and it appears that the party signing understood its language and purport, it cannot be reformed on the ground that he signed upon the faith of a contemporaneous oral promise which was not kept, nor may such promise be received in evidence to control the written contract. In equity, as at law, a written contract merges all prior and contemporaneous negotiations and promises made by word of mouth in reference to the subject of the instrument. The presumption is conclusive that the whole agreement is embraced in the writing; and while, in equity, a written contract may be canceled or reformed for fraud or mistake, it may not be canceled on the ground that the oral promise has not been kept, nor reformed on the ground that such promise was made, unless it be shown that its omission therefrom was by mistake, fraud or accident. It was not contemplated or intended by either party that the oral promise of plaintiff should be inserted in the contract. Defendant perhaps relied upon that promise. If so, its duty

was to reduce the oral undertaking or promise to writing. As was said by Judge Rapallo in *Wilson* v. *Deen*, 74 N. Y. 531: "The very purpose of the rule which excludes evidence of such declarations is to avoid the uncertainties attendant upon such evidence, and equity will not set aside the important and well-settled rule for the purpose of relieving a party against a risk which, upon his own showing, if it be true, he has voluntarily incurred. It is only when through fraud or mistake a party has executed an instrument which he believes to be in accordance with the real agreement, but which is in fact different, that equity will relieve." It is to be observed, also, that the complaint is not based upon the theory that such reformation is desired.

We have given this case most careful consideration. The seeming injustice, from an ethical point of view, which defendant has suffered at the hands of plaintiff, strongly appeals to us, and we have endeavored to find an equitable ground or principle which could be invoked in this suit, and applied for its relief. We are unable to do so. The doctrines which govern the state of facts presented by the pleadings and evidence are well settled; and, while it may be conceded that they seem to work hardship in some individual instances, their wisdom cannot well be questioned. An established rule of law must operate equally upon all cases falling within it, without regard to the views entertained by the judges touching the supposed hardship occasioned in the particular case.

The judgment and order appealed from are affirmed.

Affirmed.

PEMBERTON, C. J., dissents.

HUNT, J. I concur with reluctance, but am unable to reach any other conclusion than one of affirmance under the principles of law properly applicable.

CHARLES KELLY, RESPONDENT, v. JOS. K. CLARK, (IMPLEADED WITH OTHERS) APPELLANT.

21 291
28 96
28 97

[Submitted Jan. 23, 1898. Decided July 5, 1898.]

Corporations — Insolvency — Remedy of Creditors — Stockholders' Liability—Torts—Pleading—Surplusage—Limitations—Accrual of Cause.

1. Where a complaint by a creditor of a corporation to enforce a stockholder's statutory liability unnecessarily alleges actual fraud on the part of defendant, the allegation will be treated as surplusage, and plaintiff may recover on proof of proper allegations of fraud in law, no motion to correct the pleading being made.
2. Since Comp. St. 1887, Div. 5. C. 25, Sec. 457, providing that stockholders shall be individually liable to creditors to the amount of their unpaid stock for all acts of the company until the whole amount of stock subscribed for shall have been paid in, prescribes no remedy, a judgment creditor whose execution against the corporation has been returned *nulla bona* may go into equity to obtain relief against the stockholders.
3. Under Const. Art. 15, Sec. 10, providing that no corporation shall issue stock except for labor done or money and property actually paid, and all fictitious increase of stock shall be void; and under Comp. St. 1887, Div. 5, C. 25, Sec. 457, providing that stockholders shall be individually liable to creditors to the amount of their unpaid stock for all acts of the company until the whole amount of stock subscribed for shall have been paid in; and Section 458, providing that the trustees of a company may purchase mines and issue stock to the amount of the value thereof, in payment thereof, which shall be taken as full paid stock, and not liable to any further call,—the purchase of a mine which the stockholders knew was worth not over $125,000, and payment therefor in stock whose par value is $7,500,000, which is repurchased by the stockholders with full knowledge of the transaction at 2½ per cent. of its par value, is fraudulent as to a creditor, and the stock will be treated as unpaid to the extent of the difference between the actnal value of the mine and the nominal value of the stock.
4. One accepting mining stock issued to him with knowledge that it was issued for a mine worth only about 1⅔ per cent. of the total stock subscribed cannot escape liability to creditors for the unpaid balance on the ground that he did not sign the stock subscription list.
5. Under Comp. St. 1887, Div. 5, C. 25, Se . 457, providing that stockholders shall be individually liable to the amount of their unpaid stock for all acts and contracts of the company until the whole amount of stock subscribed for shall have been paid in, a holder of such unpaid stock is liable for the torts of the corporation.
6. The statute of limitations (Comp. St. 1887, Div. 1, Sec. 42), does not begin to run against a stockholder of a corporation liable on unpaid stock for a tort of the corporation, until the creditor has liquidated his claim, or reduced it to judgment, and failed to make it against the corporation, unless it appears to be useless to proceed against the corporation.

Appeal from District Court, Lewis and Clarke County; Horace R. Buck, Judge.

Suit by Charles Kelly against the Fourth of July Mining Company, Joseph K. Clark, and others. There was a judg-

ment for plaintiff against Joseph K. Clark, and from the judgment and an order denying a new trial he appeals. Affirmed.

Statement of the facts by the justice delivering the opinion.

The Fourth of July Mining Company, a mining corporation was organized under the laws of Montana (Chapter XXV, Fifth Division, General Laws of 1887) on December 19, 1889. Its capital stock named in the articles of incorporation was $7,500,000, consisting of 750,000 shares of $10 each. The articles of incorporation were signed by J. K. Pardee, S. T. Hauser, E. Zimmerman, W. F. Sanders, T. H. Kleinschmidt, J. K. Clark, and L. Teuscher. These same persons were named in the articles as trustees, and became the trustees of the corporation, which was immediately perfected in its organization by the election of the defendant J. K. Clark as president, S. T. Hauser as vice-president, T. H. Kleinschmidt as treasurer, C. B. Garrett as secretary, and J. K. Pardee as manager.

The complaint of the plaintiff (respondent here), after averring the facts as hereinbefore set forth in relation to the incorporation and organization of the corporation, then alleges that the trustees of said company, for the purpose of fraudulently relieving all persons who had theretofore subscribed for stock, or who might thereafter subscribe for stock or who might thereafter by any means become owners of stock in the said company, from any personal liability by reason of such subscription or ownership, did on Dec. 19, 1889 cause to be spread upon the records of the meeting of the trustees a resolution to the effect that. J. K. Pardee appeared before the meeting, and offered to convey a seven-eighths interest of the Fourth of July Mine to the corporation, in consideration of 750,000 shares of the stock of said corporation and that the proposition was accepted. It is averred that, upon the acceptance of said proposition, the said Pardee transferred to the corporation a seven-eighths interest in said mine, and the

trustees thereupon directed that the company deliver to T. H. Kleinschmidt, trustee for J. K. Pardee, by agreement with the said trustees, all of the capital stock of said company, to-wit, 750,000 shares, to be by said Kleinschmidt distributed as the said Pardee should direct; that the seven-eighths interest in the mine conveyed by Pardee to the corporation was not of greater value that $75,000, and that each and all of the trustees knew at the time of conveyance of the same that it was of no greater value than $75,000, but that, in violation of their duty, the trustees fraudulently, and with intent to relieve such persons as had subscribed for stock of said company, or who might thereafter subscribe, or who might become owners of stock, from any personal liability by reason of such subscription or ownership, accepted the conveyance from Pardee in full payment for 750,000 shares of stock issued as aforesaid; that the corporation was organized to purchase the said seven-eighths interest from Pardee, and that for such purpose the defendants Kleinschmidt, Seligman, Clark, Phelps, and the other parties named as trustees, together with others, associated themselves to organize the said mining company, and to acquire the said property under the mutual agreement that the corporation should be organized with a capital stock $7,500,000 in shares of $10 each, and that all of the stock should be, as it afterwards was, transferred to said Pardee in exchange for the seven-eighths interest in the mine, each of the persons associating themselves agreeing to take from Pardee, after the stock should be issued to him, a certain number of shares of the stock at the rate of 25 cents per share; and that each and all of such persons, at the time they associated themselves together, well knew that the said seven-eighths interest in the said mine was not worth to exceed $75,000, and that $7,500,000 was a sum grossly and fraudulently in excess of the true value of the mine, and that the said agreement to so issue the stock to the said Pardee was entered into between the said persons so associating themselves with the fraudulent intent of relieving themselves from any personal liability by reason of their becoming the owners of

any of said stock upon the pretense that the same had been fully paid for; that each of the defendants became the owner of certain shares of the capital stock of the company, defendant Clark being at the time of the commencement of this action the owner of 173,800 shares, and that each of the defendants acquired his stock with the full knowledge of the fact that the same had been originally issued to Pardee upon a gross and fraudulent overvaluation of the property transferred in exchange for the same, and that the said property so transferred was of a value not to exceed $75,000, by reason of which plaintiff averred that all of said stock so held by the defendants is unpaid stock, except in the proportion which $75,000 bears to $7,500,000.

The plaintiff then avers that on June 28, 1894, he recovered a judgment against the Fourth of July Mining Company in the sum of $15,600 and costs, for damages on account of personal injuries plaintiff received while in the service of the defendant company and under contract with it; that execution was duly issued upon said judgment, but that the same was returned wholly unsatisfied; and that the Fourth of July Mining Company is wholly insolvent. The plaintiff demanded judgment that the amount due and unpaid upon the stock of said mining company held or owned by defendants may be determined by the court, and that they and each of them be adjudged to be indebted thereon to the said mining company upon each share of stock held or owned in the amount of the face value thereof, to-wit, $10, less such proportion of the sum of $10 as $75,000 bears to $7,500,000; that they and each of them be required to pay into court such sums as may be so found due; and, that out of the sum so paid, plaintiff be paid the amount of his judgment against the corporation, with interest and costs.

The defendant Clark denied the allegations of the complaint in relation to the fraudulent intent and purposes alleged in plaintiff's complaint pertaining to the organization and purposes of the organization of the corporation, and set forth affirmatively "that at the first meeting of the board of di-

rectors of the company a proposition, similar to the one referred to in the complaint, was made to the directors; that said proposition was referred to a committee of three members of the said board of directors, to investigate said proposition and report thereon to said board of trustees; that the committee reported that the property offered for sale was worth the consideration asked therefor, and that it was for the best interest of said corporation to accept such proposition and purchase said property; and that thereafter defendant Clark, relying on the report of said committee, and in good faith believing the same, and with no intention at that time of buying any stock in said company, and without having agreed to buy any thereof, voted to accept such proposition. Clark further states that he never bought or agreed to buy any stock in said corporation until long after the stock had been issued in payment of the same, and that he never did buy any stock except such as was purchased by him in open market, and that all such stock was on its face declared to be fully paid. Defendant's answer also sets forth the fact that on the 19th day of December, 1889, the Fourth of July property so bought by the company was of the reasonable value of $7,500,000."

The defendant Clark, for a separate defense, also alleged that the injury which the plaintiff herein suffered, and for which he recovered the judgment mentioned in the complaint herein, was received by him more than three years before the commencement of this action, and that all the stock which he ever bought or owned in said defendant company was so bought more than four years prior to the commencement of this action.

The defendants Seligman and the Fourth of July Mining Company filed a separate answer, setting forth substantially what the answer of defendant Clark contained in relation to the denials of fraud alleged in plaintiff's complaint.

The plaintiff replied to defendant Clark's answer, denying Clark's belief in the report of the committee in relation to the value of the mine, or that he acted thereon in good faith, denying that defendant Clark never agreed to buy stock in the

corporation until long after the stock had been issued in payment for the mine, and denying that all or any of the rest of the stock ever bought or owned by defendant was bought by him from a prior purchaser, who had bought the same in open market. The replication to the other answer is substantially the same as the last.

The case was tried to a jury. Separate findings were returned. The court adopted all the findings of the jury except two. Conclusions of law were made by the court, rendering J. K. Clark liable for the claim of plaintiff. Judgment was ordered accordingly in plaintiff's favor, against Clark, but in favor of defendants Kleinschmidt and Seligman. Defendant Clark moved for a new trial, which was denied. He appeals to this court from the judgment and the order denying his motion for a new trial.

Clayberg & Corbett, *John B. Welcome*, *Wm. H. De Witt* and *Thos. C. Bach*, for Appellant.

It is contended on the part of appellant that the court below erred in ordering judgment for the plaintiff in this that neither the complaint nor the evidence herein support the said judgment. It is difficult to determine from an examination of the complaint or from the evidence submitted whether it is sought to charge the defendant solely as a subscriber of stock for the difference between what he actually paid therefor and the par value thereof, or whether it is sought to charge him with fraud as a director of the company. From the complaint it would appear that the plaintiff seeks to recover on the theory that the trustees fraudulently and with intent to deceive, and for the purpose of relieving themselves of personal liability on any stock they might buy in the said company, and with the intention of becoming stockholders caused all the capital stock to be issued to J. K. Pardee, in payment of property which they claim was of the value of only $75,000. It will be seen then that actual fraud is charged, but it is not alleged that plaintiff was misled by any

action of the trustees nor is it alleged or shown by the evidence how Kelly was placed in any different position, with reference to the injury sustained by him and by reason of the issuance of the stock in payment of the property in excess of its actual value, than he would otherwise have been, no damage was shown to haye resulted to Kelly. It can hardly be said that when Kelly entered the employ of the Fourth of July Company he anticipated being injured and was willing to suffer the injury relying upon the fact that the capital stock of the company for which he worked was in the hands of persons who had not paid full par value therefor. If the testimony on behalf of plaintiff shows any fraud it is constructive and not actual. To entitle plaintiff to recover here he must prove actual fraud. (Biglow on Frauds, Vol. 1, page 42; Thompson on Corporations, Vol. 2, S. 1629.) Allegation of fraud is not proved by proof of mistake. (39 Cal. 532; Thompson on Corporations, Vol. 2, S. 1619.) If it is sought to charge Clark for balance unpaid on a subscription to stock of the corporation, we contend that the judgment is not supported by the pleadings or the evidence, and that the court below erred in rendering judgment thereon. It is admitted by the plaintiff's complaint that the seven-eighths interest in the Fourth of July Mine at the time it was purchased by the Fourth of July Company was of the value of $75,000. The court found its value to be $125,000. The value of the shares at the time of their issuance to Pardee, was nil. The company was organized for the purpose of carrying on mining operations; the property purchased was mining property; the shares issued therefor were what is known in this country as mining shares, and bore on their face the statement that they were fully paid and non-assessable. The property for which these shares were issued had an actual substantial value, and we contend that under no theory can it be held that any purchaser of these shares, even with a knowledge of the conditions under which they were issued, could be held as a subscriber of stock for the difference between the amount paid therefor and the par value thereof.

At common law it is well settled that corporate creditors cannot hold stockholders liable on stock which has been issued for property, even though the property was turned over to the corporation at the agreed valuation which was largely in excess of the real value of the property, provided the property has some substantial value. (*Van Cott* v. *Van Brunt*, 82 N. Y. 535; *Fogg* v. *Blair*, 139 U. S. 118; *Barr* v. *New York, Etc., Railroad*, 125 N. Y. 262; *Bickley* v. *Schlag*, 20 Atl. Rep. 250; *Clow* v. *Brown*, 31 N. E. Rep. 361; *Dupent* v. *Tilden*, 42 Fed. Rep. 87; *Coffin* v. *Randall*, 1 Corp. & L. J. 326; *Continental Telegraph Co.* v. *Nelson*, 18 Weekly Digest 48; *Morrison* v. *Globe Panorama Co.*, 28 Fed. Rep. 817: *Crawford* v. *Rohrer*, 59 M. D. 599; *Phelan* v. *Hayard*, 5 Dill. 45; *Scofield* v. *Thayer*, 105 U. S. 143; *Anderson's Case L. R.*, 7 Ch. D. 75; Cook on Stock and Stockholders, 3rd Ed., Vol. 1, S. 26.) We contend that the common law with reference to the liability of stockholders still obtains in Montana. The Montana Constitution provides that no corporation shall issue stock or bonds except for labor done, or money or property actually received; and all fictitious stock or indebtedness shall be void. This constitutional provision is the same as is embraced in the constitution of various other states where it has been held that the provision is applicable and effective, only when the issue of stock is entirely fictitious, and that it does not interfere with the customary methods of starting a corporation enterprise by the issue of stock and bonds in payment of corporate property. (Cook on Stock and Stockholders, 3rd ed., Vol 1, S. 47; *Peoria Railroad Co.* v. *Thompson*, 103 Ill., 107; *Stein* v. *Howard*, 65 Cal. 616; *Memphis Railroad* v. *Dow*, 120 U. S. 287; *Fogg* v. *Blair*, 137 U. S. 118.) Nor do the Montana Statutes change the rule with reference to the liability of stockholders. Section 457 of the Fifth Division of the General Laws Compiled Statutes of Montana provides that "The parties or stockholders of every company incorporated under the provisions of this article shall be severally and individually liable to the creditors of the company under which they are stockholders

to the amount of the unpaid stock held by them respectively, for all acts or contracts made by such company, until the whole amount of capital stock subscribed for shall have been paid in." The succeeding section, Section 458, provides that "The trustees of such company may purchase manufactories and other properties necessary for their business and issue stock to the amount of the value thereof in payment therefor, and stock so issued shall be declared and taken to be full stock and not liable to any further call; neither shall the holders thereof be liable for any further payment, under the provisions of Section 456 of this chapter, but in all statements the reports of the company to be published this stock shall not be stated or reported as being issued for cash paid into the company, but shall be reported in this effect according to the facts." This statute we contend is simply affirmatory of the common law doctrine hereinbefore stated, and it surely cannot be held that Section 458, even by implication in any manner enlarges the rights of the creditors of a corporation as against the stockholders.

C. B. Nolan & T. J. Walsh, for Respondent.

The sufficiency of the evidence to sustain the specific facts alleged is not attacked in appellant's brief. The claim is made, however, that in point of law the complaint is insufficient, not because of any formal omissions or technical lack, but because the law does not afford any relief under the circumstances, all mere questions of pleading being waived. The sole question for consideration as presented by the brief is, therefore, whether the complaint supports the judgment. The brief asserts that it is "well settled" that stockholders are not liable to creditors on stock issued for property at a valuation largely in excess of its true value, assuming that the trustees knew of the overvaluation. The question was mooted at one time, but no court has undertaken to so decide within ten years. (*Coffin* v. *Ramsdell*, 11 N. E. 20; *Adamant Co.* v. *Wallace*, 48 Pac. 415-416; *Boynton* v. *Hatch*, 47 N. Y. 225; *Boynton* v. *Andrews*, 63 N. Y. 93; *Douglass* v. *Ireland*, 73

N. Y. 100; *Iron Co.* v. *Drexel*, 90 N. Y. 87; (1890) *Gamble* v. *Water Co.*, 123 N. Y. 91; (1891) *National T. W. Co.* v. *Gilfillan*, 124 N. Y. 302; (1891) *Goodrich* v. *Dorman*, 14 N. Y. S. 879; (1892) *Herbert* v. *Uhl*, 20 N. Y. S. 743; (1895) *White* v. *Jones*, 34 N. Y. S. 203; (1891) *Elyton Land Co.* v. *Birmingham*, 92 Ala. 407; *Coit* v. *N. C. Gold Amalgamating Co.*, 119 U. S. 343; (1892) *Lloyd* v. *Preston*, 146 U. S. 630; (1890) *Libby* v. *Tobey*, 19 At. 904; *Wetherbee* v. *Baker*, 35 N. J. E. 501; *Shickle* v. *Watts*, 94 Mo. 410; (1890) *Farmers' Bank* v. *Gallagher*, 43 Mo. App. 482; (1891) *Lucke* v. *Tredway*, 45 Mo. App. 507; *Alling* v. *Wenzel*, 27 Ill. App. 511; (1890) Same Case, 133 Ill. 264; (1895) *Coleman* v. *Howe*, 154 Ill. 458; (1891) *Thayer* v. *El Pomo M. Co.*, 40 Ill. App. 344; *Bailey* v. *Coal Co.*, 69 Pa. St. 334; (1895) *Pen. Sav. Bank* v. *Stove Polish Co.*, 63 N. W. 514; *Osgood* v. *King*, 42 Ia. 478; *Chisholm* v. *Forney*, 21 N. W. 664; *Jackson* v. *Traer*, 20 N. W. 764; *Boulton* v. *Mills*, 78 Ia. 460; (1894) *Henderson* v. *Turngren*, 35 Pac. 495; (1891) *Gogebic Inv. Co.* v. *Iron Chief M. Co.*, 47 N. W. 726; (1892) *Hospes* v. *N. W. Car Co.*, 50 N. W. 1117; (1896) *Hastings* v. *Iron Range Co.*, 67 N. W. 652; (1896) *Wishard* v. *Hansen*, 68 N. W. 691; (1895) *Gilkie* v. *Dawson*, 64 N. W. 978; (1896) *Salt Lake* v. *Tintic M. Co.*, 45 Pac. 200; (1897) *Adamant Co.* v. *Wallace*, 48 Pac. 415; (1897) *Roman* v. *Dimmick*, 22 So. 109; (1897) *Addison* v. *Milling Co.*, 79 Fed. 459.)

Under Compiled Statutes, 5th Div. Sec. 458, it is immaterial whether the overvaluation is intentional or fraudulent or not, the property pays for the stock only to the extent of its actual value. (Thompson's Commentaries, 1616.) In the foregoing list of cases, those from New York are placed first because section 458 of our statute is a verbatim copy of the section of their general manufacturing act, permitting corporations organized under it to pay for property with stock. (See *Boynton* v. *Hatch*, 47 N. Y. 230.) The case of *Van Cott* v. *Van Brunt*, 82 N. Y. 535, arose under a statute which placed no restriction whatever on the power of the corporation to dispose of its stock for anything and at any price.

And the decision was, in the opinion, distinguished from *Boynton* v. *Hatch* upon this very ground. And lest any misconception might arise about the matter, the court of appeals took occasion to point out in *Gamble* v. *Water Co.*, 123 N. Y. 107, that this fact explains the apparent conflict between *Van Cott* v. *Van Brunt* and the line of cases of which *Boynton* v. *Hatch* was the parent. The appellant says that the liability under this statute is the same as the liability at common law. The New York Court of Appeals says in these cases that it is not, and as our statute comes from that state we are under the necessity of taking their exposition. It may be said in this connection, however, that the common law, as now construed, as shown by many of the cases cited, when no special statute exists, condemns the subterfuge of fraudulently over-valuing property taken in exchange for stock, and holds it as paid in such cases only to the amount of the true value of the property. The charter under consideration in *Coit* v. *N. C. A. Co.*, 119 U. S. 343, empowered the trustees to take either money or property in payment for stock, but it contained no provision to the effect that the property should be taken at its value. The case next cited by the appellant, *Fogg* v. *Blair*, 139 U. S. 118, is likewise much availed of to support the general proposition of non-liability in this class of cases. But what did it decide? Simply that when a corporation was a "going concern" and was indebted and had no other means of discharging its obligations to its creditors, it might, in satisfaction of its existing obligations, turn out whatever stock remained unappropriated at such value below par as it might agree upon with the creditor, who would otherwise throw the corporation into bankruptcy, and that no liability would attach to the creditor taking the stock under those circumstances. It is only those who wilfully see awry who find in this case any justification for the contention that at its organization a corporation can put out its stock as full paid when it is not full paid and have it circulate in the hands of those who take it with knowledge, freed from liability. This was a feature also in the case of *Van Cott* v. *Van Brunt*. The cases of

Hundley v. *Stutz*, 139 U. S. 417, and *Clark* v. *Bever*, 139 U. S. 96, held the same way. That the learned and august tribunal pronouncing these judgments did not intend by the decision in them to recede from the doctrine it had established in a long line of cases, *Sanger* v. *Upton*, 91 U. S. 56; *Upton* v. *Trebilcock*, 91 U. S. 45; *Webster* v. *Upton*, 91 U. S. 65; *Chubb* v. *Upton*, 95 U. S. 665; *Pullman* v. *Upton*, 96 U. S. 328; *Hatch* v. *Dana*, 101 U. S. 205; *Hawley* v. *Upton*, 102 U. S. 314; *Scoville* v. *Thayer*, 105 U. S. 143; *Patterson* v. *Lynde*, 106 U. S. 519; *Coit* v. *N. C. G. A. Co.*, 119 U. S. 343; *Washburn* v. *Green*, 133 U. S. 30, that no sort of arrangement with the corporation, short of actual payment for the stock, would relieve those who became its holders, except under the peculiar circumstances involved in the cases reported in the 139 U. S. and above referred to, it itself declared in *Camden* v. *Stuart*, 144 U. S. 104. And when the case of *Lloyd* v. *Preston*, 146 U. S. 630, came before it, a case presenting identically the same legal features as the one now before this court, it merely said: "It having been found on convincing evidence that the over valuation of the property transferred to the railway company by Harper, in pretended payment of the subscription to the capital stock, was so gross and obvious as, in connection with the other facts in the case, to clearly establish a case of fraud, and to entitle *bona fide* creditors to enforce payment by the subscribers, it only remains to consider the effect of the other defenses set up." It is not necessary to classify this action. There are two theories of the liability in these cases—one the fraudulent representation theory, the other the trust fund theory. This complaint is good whichever theory is adopted. If the former, it is good by the rule of *Hospes* v. *N. W. Car Co.*, 50 N. W. 1117; if the latter, it is good by the rule of *Gogebic Inv. Co.* v. *Iron Chief Co.*, 47 N. W. 726. It is said that if the case proceeds upon the fraud theory, it must be averred that the plaintiff relied upon the fraudulent representation. The contention was made and refuted by the court in the Hospes case, above cited, which vigorously maintains the fraud theory.

Supplemental brief of appellant: It is admitted in the case that the defendants, and particularly the defendant Clark, had no intention, at the time that he accepted the property at an overvaluation, of relieving himself from any responsibility or liability whatever, either as a stockholder or as a trustee. The trial court has accepted the theory that the mere fact of overvaluation constitutes legal fraud, and has ignored the question as to whether or not the defendants intended to benefit themselves by their so-called fraud. This question was considered in the case at the time of trial. The court submitted to the jury a certain finding, numbered 6 (see transcript on appeal, p. 147), which finding is as follows: "When the defendant Clark took part in the action of the trustees of the company at the meeting held on December 19, 1889, in passing resolutions and proceedings there had, did he do so with the intention or purpose of relieving himself or other stock purchasers from a personal liability on the stock that he or they might acquire?" The jury found in the negative on this question, and found, therefore, that Clark had no such intent. But afterwards, the court appears to have taken the view that the mere overvaluation of the property in the way that it is shown to have been overvalued, if it was so shown, in itself constituted fraud, without any question arising as to the intention of the defendants in overvaluing the property, if they did overvalue it. We contend that this theory of the case adopted by the court is not the proper one. To entitle the plaintiff to recover in the case he must prove actual fraud, (Thompson on Corporations, Sec. 1618.). *Whitehall* v. *Jacobs*, 75 Wis. 474; in which case the Supreme Court of Wisconsin holds that the true rule is as stated by the Supreme Court of the United States in *Coit* v. *The Amalgamating Co.*, 119 U. S , 343, wherein the Supreme Court of the United States stated the rule to be as follows: That if it were proved that actual fraud was committed in the payment of the stock * * * there would undoubtedly be substantial ground for the relief asked. (*Ft. Madison Bank* v. *Alden*, 129 U. S., 373; *Young* v. *Erie Iron Co.*, 65 Mich.

111.) That the question of fraud should be tried and left to the jury or to the court, and that it should be tried and found as a question of fact in the case. (See Thompson on Corporation, Sec. 1629.)

The basis of this action is the fraud which the trustees of the Fourth of July Co. or the defendants in this action perpetrated at the time of the organization of the company and the purchase of the property. Unless the main question of fraud of the defendants be found and determined, the case cannot be considered as having been decided. The jury, it is true, decided this question of fraud, and decided it in favor of the defendants, but the court set aside the findings of the jury upon the question of fraud and failed to make any finding at all upon that question. We therefore respectfully submit that, the question of fraud not having been found against the defendants, the judgment of the court is not supported by the findings, and that the court should have found directly upon this question of fraud. The authorities hereinbefore cited upon the question that actual fraud must be proved, are clearly applicable to this point as deciding that the question of fraud must be determined, and the opinion of the Supreme Court of the State of Wisconsin in the case of *Whitehall* v. *Jacobs*, above cited, is peculiarly applicable. The appellants further contend that in a case such as the one at bar the plaintiff has no right of recovery under the facts pleaded and proved. (Cook on Stock and Stockholders and Corporation Law, Third Edition, Vol. 1, Sec. 46.)

In the action at bar, the plaintiff Kelly, having instituted and tried his action against the defendants upon the theory that the defendants were guilty of fraud, and having recovered his judgment in this action upon the facts found by the court and the jury that the defendants, and particularly the defendant Clark, were so guilty, as charged in the plaintiff's complaint, then it must be true that the plaintiff's rights must be determined according to the rules laid down and adopted by text writers and courts of last resort governing actions of a similar nature. Where fraud is relied upon as the basis of

the action, the plaintiff is required to show (and in some jurisdictions is even required to plead) that he, the party complaining of the fraud, relied thereon, and that his action would have been other or different save and except for the fraudulent misrepresentations or other fraudulent propositions complained of. (Pomeroy's Equity Jurisprudence, Second Edition, Vol. 2, Sec. 890.) Assuming, for the sake of argument, that the proceedings complained of in plaintiff's complaint in and about the institution of the Fourth of July company and the issuance of its stock, were as fraudulent as plaintiff asserts, it cannot be conceived that the plaintiff, at the time he received the injuries which he mentions in his complaint as the basis of his action, was relying upon any representation as to the paid up quality of the shares of the defendant corporation. It is not reasonable to suppose that the plaintiff, when he entered into the employ of the defendant company, expected that he would receive a personal injury from the negligence of the company, and further expected to be compensated for his injury, and that he relied for such compensation upon the fact that the trustees of the Fourth of July company had held out to the public that the shares of stock of the corporation were full paid up to the extent of $7,500,000, or any other sum. (Citing: *First National Bank of Deadwood* v. *Gustin Minerva Con. Min. Co.*, 44 N. W. Rep. 198; *Hospes* v. *Northwestern M'f'g and Car Co.*, 50 N. W. Rep. 1117 (and cases cited); *Adamant Manufacturing Co.* v. *Wallace*, 48 Pac. 145; Cook on Stock and Stockholders, Vol. 1, Section 46; *Bank of Fort Madison* v. *Alden*, 129 U. S. 373; *Coit* v. *Gold Amalgamating Co.*, 119 U. S. 343).

Reply brief of respondent: In our view the natural and necessary consequence of the acts of the trustees (could they be sustained) would be to relieve the stock from liability; and the law, deeming that they intended the natural and necessary consequences of their acts, will say that the transaction is fraudulent. So the New York court holds. Lest it should

be imagined that perhaps the New York court is peculiar in its views upon this point, we quote the following from the opinion of the Supreme Court of Nebraska in *Gilkie* v. *Dawson*, 64 N. W. 978-983: "It will be sufficient to impeach the transaction to prove that the stock issued and delivered to the subscriber exceeded in amount the value of the property conveyed to the corporation in payment for the stock; that the parties to the transaction of sale and purchase of the stock knowingly and advisedly placed such overvaluation upon it; that there was paid in stock for it an amount the par value of which was known to be more than the actual value of the property. (*Tube Works* v. *Gilfillan*, 124 N. Y. 302, 26 N. E. 538; *Wetherbee* v. *Baker*, 35 N. J. Eq. 501; *Osgood* v. *King*, 42 Iowa 478; *Carbon* v. *Mills*, 78 Iowa 460, 43 N. W. 290; *Jackson* v. *Traer*, 64 Iowa 469, 20 N. W. 764; *Bailey* v. *Coke Co.*, 69 Pa. St. 334; *Thayer* v. *El Pomo Mining Co.*, 40 Ill. App. 345; *Elyton Land Co.* v. *Birmingham Warehouse and Elevator Co.*, 92 Ala. 407, 9 South. 129; *Leucke* v. *Tredway*, 45 Mo. App. 507; *Crawford* v. *Rohrer*, 59 Md. 599; *Northwestern Mut. Life Insurance Co.* v. *Cotton Exchange Real Estate Co.*, 46 Fed. 22; *Scoville* v. *Thayer*, 105 U. S. 143)." Now what is the extent of that liability and to what class of obligations does it extend? Sec. 457 Compiled Statutes, 5th Div. answers this. How is it possible to cut out of this statute the words "acts of" and say the liability extends to contract obligations only? That this liability reaches to torts goes without saying. (Spelling on Corporations, 909; *Powell* v. *Railway Co.*, 36 Fed. 726.)

Brief of Wm. H. DeWitt in answer to brief of respondent: Respondent claims that it is not important to classify this action. While we concede the general principle that under modern procedure one may set up the facts, and receive from the court the relief which the facts show he is entitled to, still he must depend upon legal principles for an adjudication upon the facts; it is, therefore, important to determine upon what legal principle respondent brought this action. He seems, in

a portion of his briefs, to rely upon the statutes. (Sections 457, 458, Compiled Statutes of 1887.) If the respondent relies upon these sections of the statute, then his action is "upon a liability created by statute." (1 Wood on Limitations, p. 90, Sec. 36, p. 59, note 77; *Higby* v. *Calaveras County*, 18 Cal. 176.) If the action is upon a liability created by statute it is important to note that respondent was injured May 26, 1891. The cause of action, if any, under section 457, arose then, for the statute undertakes to make the stockholders liable for all acts or contracts made by the corporation. The act for which respondent seeks to make the stockholders liable was the act of injuring him by the company in 1891. Therefore, the stockholders then became liable and the cause of action then arose, and the action could then have been commenced against the stockholders (*Young* v. *Rosenbaum*, 39 Cal. 646), but the action was not commenced against the stockholders until August 13, 1894. The statute, which was two years, had then run. (Compiled Statutes of 1887, 1st Div., Sec. 42, and Laws of 1893, page 50.) Furthermore, if the action is one for liability created by statutes, then the original judgment of Kelly against the Fourth of July Mining Company, recovered June 28, 1894, was not evidence of the debt of the corporation to Kelly, but this judgment was the only evidence offered, and, therefore, there was none upon these points. (*Stephens* v. *Fox*, 83 N. Y. page 317, citing *Miller* v. *White*, 50 N. Y. 137, and *McMahon* v. *Macy*, 51 N. Y. 155. See, also, other cases in former briefs, and, as an analogous case, *Rodini* v. *Lytle*, 17 Mont. 448; also, *State Savings Bank of Butte* v. *Johnson*, 18 Mont. 440.) The question of the bar of the statute is raised in Clark's answer, page 11, line 17, and the time of the commencement of the injury also appears in the record. The constitution of the state is not important in this action. It provides that "No corporation shall issue stocks or bonds, except for labor done, services performed, or money and property actually received, and all fictitious increase of stock or indebtedness shall be void." In this case it is admitted that stock was issued for

property actually received. There can be no contention that this stock was fictitious; it may have been overvalued, but it had a substantial value (see cases in former brief), and was, therefore, not fictitious.

This action, if anything, is a creditor's bill. The respondent himself so states in his brief No. 1, first paragraph. (See, also, Morawetz on Corporations, Sec. 866; *Hastings* v. *Daniel Drew*, 76 N. Y. page 9, and the cases in each printed brief. When Kelly obtained his judgment against the Fourth of July Company he then became subrogated to the rights of the company as against subscribing stockholders for an unpaid balance on the stock. (*Stephens* v. *Fox*, 83 N. Y. 313, and cases in former brief.) If there were a fraud between the corporation and the subscribing stockholders, neither could raise that question because each was a participant in the fraud, and neither could take advantage of their own fraud. But Kelly being subrogated to the rights of the company when he obtained his judgment, he can raise the question of fraud as against the subscribing stockholders; but he can rely upon one kind of fraud only, that is actual fraud and not legal or constructive fraud. (Cases *infra* and in former briefs.) The plaintiff's whole complaint is upon the theory of actual fraud. He alleges "that the capital stock of the said company was a sum grossly and fraudulently in excess of the true value thereof, * * * and that the transactions with Pardee were with the fraudulent intent of relieving themselves of any personal liability, etc." (Record, page 5, line 11.) Again, he alleges, "a gross and fraudulent valuation of the property." (Record, page 6, line 8.) In order to charge these defendants in a creditor's bill it is necessary to allege and prove actual fraud. (*Fort Madison Bank* v. *Alden*, 129 U. S. 327; *Whitehill* v. *Jacobs*, 75 Wis. 474, 20 Atl. 250; *Coit* v. *Amalgamating Co.*, 119 U. S. 343; *Fogg* v. *Blair*, 139 U. S. 118, and cases cited in former briefs.) Actual fraud was attempted to be alleged, but, on the authority of *Fogg* v. *Blair*, *supra*, it would seem was insufficienty alleged. There is no finding of actual fraud. The jury indeed found that there was not

actual fraud in finding No. 6. This finding the court set aside and did not find upon this subject at all. This question we can raise at this time. (See a following paragraph in this brief.) The only finding which respondent can construe as being a finding of fraud was that there was an overvaluation of the property for which the stock was given. Overvaluation of the property is not actual fraud, and a finding to that effect is not a finding of actual fraud, but such fact is only evidence tending, perhaps strongly, to prove actual fraud. (See cases last above cited and cases in former briefs; also *McFadden* v. *Mitchell*, 54 Cal. 629; *Young* v. *Erie Iron Co.*, 65 Mich. 111; *Jamison* v. *King*, 50 Cal. 132.) Therefore, if gross overvaluation is strong evidence tending to prove actual fraud, if a finding of actual fraud had been made it might have supported the judgment. If a finding of no actual fraud had been made, as it was by the jury, we would have been entitled to judgment, but no such finding was made either way.

Again, we made another request for a finding as to actual fraud when we requested the court to give the following: "When the defendant Clark took part in the action of the trustees of the company at the meeting held on December 19, 1889, in passing resolutions and proceedings there had, did he do so with the fraudulent intention or purpose of relieving himself or other stock purchasers from a personal liability on the stock that he or they might acquire?" This requested finding was still more explicit on the question of fraud than No. 6, for the reason that before the word "intention" was placed the word "fraudulent," which does not appear in No. 6. This finding the court refused altogether. We concede that the authorities which respondent's counsel cites support his statement that where there is no express finding upon an issue of fact, it is deemed to be found by the court to support the judgment. But here the situation is quite different; we expressly requested findings upon the matter of actual fraud and the court denied them. We come under the provisions of Section 1114, Code of Civil Procedure, as follows: "No judg-

ment shall be reversed on appeal for want of findings at the instance of any party who, at the close of the evidence and argument in the case, shall not have requested findings in writing and had such request entered in the minutes of the court." This section was construed, and this subject passed upon fully, in *Estelle* v. *Irvin*, 10 Mont. 509. It is evident that this was one of the material issues in the case, and we are unable to find a legal reason for its omission by the court. The rights of the parties demanded that this matter should be passed upon so that the litigation growing out of the controversy might be finally determined. * * * In *North* v. *Peters*, 138 U. S. 271, Mr. Justice Lamar, in the opinion, said: "In the case of *Dole* v. *Burleigh*, 1 Dak. 227, on which counsel for appellant mainly relies, the trial court omitted to find upon a material issue presented by the pleadings, but it made no additional findings. The court laid down and applied the long established principle, nowhere controverted, that the findings of fact by a court, like a special verdict, must decide every point in issue, and that the omission to find any material fact in issue is an error which invalidates the judgment." Our statute has affixed to this doctrine the following restrictions: "No judgment shall be reversed on appeal, for want of a finding in writing, at the instance of any party who at the time of the submission of the cause shall not have requested a finding in writing, and had such request entered in the minutes of the court."

Reply of respondent to argument of Hon. W. H. DeWitt: As pointed out in the reply of respondent to appellant's supplemental brief, if the appellant desired to raise in this court the question that there is no finding on a material issue, he must proceed according to the provisions of Sections 1114, 1115 and 1116, Code of Civil Procedure. He must, at the close of the evidence and the argument, have requested findings and had such request entered in the minutes. (Sec. 1115.) This provision probably refers to a general demand for written findings and not to specific request for a special finding on

any particular issue. He must, however, if he contends that the findings are defective (not sufficiently full) designate to the court the particular point or issue on which he desires a finding; and upon failure of the court to remedy the alleged defect, he may have a bill of exceptions, reciting the proceedings. (Sec. 1115.) And those exceptions must be filed in the court and served on the attorney of the adverse party. (Sec. 1116.) It cannot even be pretended that this course was pursued. There is no bill of exceptions in this record. There can be no pretense that any attempt was made to comply with this statute. Other exceptions taken at the trial may be settled under the provisions of Section 1155, ten days after notice of the entry of judgment being given to propose a bill. But in this case the complaining party has five days after notice of the filing of the findings within which to file his exceptions. This is no "error in law occurring at the trial," etc., to be reviewed on a statement on motion for a new trial. The trial is over, the evidence all in, and the arguments made; nothing remains but for the court to make and announce his decision. Such an alleged error cannot be reviewed on a statement on motion for new trial. (*Pralus* v. *Mining Co.*, 34 Cal. 558.) It is only error in law occurring at the trial that can be so reviewed. (*Scherrer* v. *Hale*, 9 Mont. 63; *Powder River Cattle Co.* v. *Custer County*, *Id.* 145.) This is an error occurring after the trial, there is a special statutory method prescribed for reviewing it and this must be pursued or the alleged error is unavailing. (Hayne on New Trial and Appeal, 239; *Hidden* v. *Jordan*, 28 Cal. 305; *James* v. *Williams*, 31 Cal. 213; *Brooks* v. *Calderwood*, 34 Cal. 566; *Hurlbut* v. *Jones*, 25 Cal. 230; *Lucas* v. *City*, 28 Cal. 598.) It appears from the opinion in *Estill* v. *Irvine*, 10 Mont. 509, that a bill of exceptions presenting the alleged error was settled and it was upon such bill that the review was made. No exceptions of this character were ever served on the respondent's attorneys, as required by Section 1116. The request to the court to submit certain questions to the jury cannot be alleged as error. The court is at liberty to

submit such questions as he pleases to the jury. He need not submit any at all. Error cannot be predicated upon his actions with or toward the jury in an equity case. (*Leggatt* v. *Leggatt*, 13 Mont. 190; *Zickler* v. *Deegan*, 16 Mont. 198; *Merchants Bank* v. *Greenhood*, 16 Mont. 395; *Galvin* v. *Palmer*, 113 Cal. 46.) The court had a perfect right to reserve for his own determination the question appellant asked that the jury pass upon, provided it should in his judgment be material. And it is not a compliance with the statute for the party to write out a finding and ask the court to find it. He must simply indicate to the court the point on which he desires a finding, leaving the court to find whichever way he chooses. (*Edgar* v. *Stevenson*, 70 Cal. 286; *Miller* v. *Steen*, 30 Cal. 408; *Richardson* v. *Eureka*, 42 Pac. 956–966.) And the objection that the court has made no finding on any particular issue cannot possibly be made until after the findings of the court have been filed. (*Cowing* v. *Rogers*, 34 Cal. 648–652.) (No request of any kind was made after the court's findings were filed nor was there then any objection made to court's failure to find.) Wherefore, *a fortiori*, an objection of this kind cannot be reviewed as an error of law occurring at the trial. The trial is then certainly over. But the request must be to find some ultimate material fact. No other findings are necessary or proper. (Hayne on New Trial and Appeal, 239.) Requests to find facts evidential in their character are properly refused. (*Faxon* v. *Mason*, 27 N. Y. S. 1025.) The ultimate fact here is whether the stock is unpaid or not, and the finding requested is not of that ultimate fact. At best it is only evidentiary. (*Coleman* v. *Howe*, 154 Ill. 471; *Goodrich* v. *Dorman*, 14 N. Y. S. 879.) In fact all the fraud required to be established follows as a conclusion of law from the two facts expressly found by the court, that the property was overvalued and that the trustees knew it. (*Douglas* v. *Ireland*, 73 N. Y. 100; *Iron Co.* v. *Drexel*, 90 N. Y. 87; *National T. W. Co.* v. *Gilfillan*, 124 N. Y. 302.) So if the want of findings could be urged, they will be found all that is required.

The statute of limitation proposition is answered by *Hawkins* v. *Glenn*, 131 U. S. 319; *Scoville* v. *Thayer*, 105 U. S. 143; *Hospes* v. *Car Co.*, 50 N. W. 1117; Thompson on Liability of Stockholders, 291. The liability is not direct and primary; it is secondary, and the stockholders can be resorted to only when the corporation is insolvent. The cause of action does not arise until execution is returned unsatisfied. (Thompson's Commentaries, 3770.) There is not even a liability to the corporation until a call is made. The want of such a call is sometimes interposed as a defense to these actions, but not being urged is not discussed. It may be said, however, that the rulings are to the effect that the judgment herein takes the place of a call. The liability declared by Section 457 is merely declaratory of the common law liability. (Thompson on Stockholders, 37.) But the liability allowed by the common law to incorporators issuing stock in payment for property, or rather taking property in payment for stock, is narrowed by the provisions of Section 458. (*Gamble* v. *Water Co.*, 123 N. Y. 107.) No action of law could be maintained. Some states have made provision for a special statutory action, Missouri, for instance. But in the absence of statutes containing specific provisions on the subject, and prescribing the remedy, according to the weight of authority, creditors of the corporation must exhaust their remedies against the corporation and its assets before proceeding against the shareholders upon their statutory liability. (Spelling on Corporations, 904; and cases cited, including *Bank* v. *Francklyn*, 120 U. S. 747.) Herein lies the answer to the plea of the statute of limitations. If the statute dated from the time of the injury, then we must have been able to institute action next day. But we had no cause of action until we got judgment against the corporation and exhausted its assets. (Thompson's Commentaries, 3521, 3351; *Thompson* v. *Reno Bank*, 3 Am. St. Rep. 797, and extensive notes.) In California the rule is different, because the liability created by their statute is essentially different from that created by ours. The California liability is direct, absolute, unconditional.

The corporate assets need not be first resorted to. The stockholder can be sued at once for whatever liability he is under.

HUNT, J. Appellant's counsel, in their opening brief, declare they find difficulty in telling whether the respondent's action was brought upon the theory that defendant was liable, as a subscriber of stock, for the difference between what he actually paid therefor and the par value thereof, or whether it is sought to charge appellant with fraud, as a director of the company. This difficulty arises, argue counsel, because it appears by the complaint that the theory of respondent is that the trustees fraudulently, and to relieve themselves of personal liability, caused all the capital stock to be issued to Pardee in payment of the property, which they claim was of the value of only $75,000. Counsel say: "Actual fraud" is charged, but, because it is not alleged or proved how Kelly was put in any different position by reason of the issuance of the stock in payment of the property in excess of its actual value than he otherwise would have been, they conclude no damage was proved to have come to him. Solution of this difficulty being of importance, an examination of the findings of the jury is appropriate in order to understand the exact facts to which must be applied the principles that should control.

Considerable testimony was heard bearing directly upon the issues submitted to the jury, and the following facts were found:

(1) That the trustees of the corporation, when they directed the issuance of 750,000 shares of stock in payment of a seven-eighths interest in the mine, did not actually believe that the said interest was worth the par value of said stock, namely, $7,500,000.

(4) That the par value of the seven-eighths interest in the mine at the time of the purchase by the trustees of the corporation was $125,000.

(5) That the trustees of the corporation, at the time they agreed to issue all of the stock of the company to Pardee et

al. in payment of a seven-eighths interest in the mine, knew, or might have ascertained by the exercise of reasonable diligence, that the par value of the stock paid for such interest was in excess of the actual value of the property purchased.

(6) That the defendant Clark, in taking part at the meeting of the trustees of the corporation held on December 19, 1889, did not participate therein with the intent to relieve himself or other stock purchasers from a personal liability to the stock that he or they might acquire.

(7) That from information of the mine that defendant Clark had on December 19, 1889, there was no reasonable ground to believe that a seven-eighths interest was apparently worth the amount of the par value of the shares.

(8) That Clark at that time did not honestly believe that a seven-eighths interest in the mine was apparently worth the amount of the par value of the shares.

(9) That the apparent value of a seven-eighths interest in the mine at that time was not the amount of the par value of the shares.

(10) That the defendant Kleinschmidt, in participating at the meeting of the corporation of December 19, 1889, did not intend to relieve himself or other stock purchasers from a personal liability on the stock that he or they might acquire.

A motion was made to the district court to reject the findings of the jury, with the exception of those numbered 6 and 10. This was denied, and all the findings of the jury were adopted by the court except 6 and 10, and in addition the court found as follows:

(11) That all of the stock of the corporation standing in the name of Kleinschmidt, with the exception of 250,000 shares, were held by him as trustee for Pardee, under the trust agreement referred to in the complaint.

(12) That the remaining 250,000 shares held by said Kleinschmidt were held by him as trustee for the company, and were treasury stock, donated to the corporation by Pardee at the first meeting of its board of trustees after the agreement between him and the company by which the entire issue of the

capital stock was to be paid to him for a seven-eighths interest in the mine.

(13) That all the stock issued to Kleinschmidt was issued to and stood on the books of the company in the name of T. H. Kleinschmidt, trustee, and that the trust in Kleinschmidt for Pardee and the company was created by direct resolution and previous authority of the company itself, and that the company was privy to the creation of both trusts.

The learned judge who presided at the trial of the case drew the following conclusions of law: (1) That defendants Kleinschmidt and Seligman were not liable for the claim of the plaintiff; (2) That the defendant Clark was liable.

What led to the exoneration of any defendants other than Clark is immaterial. The case before us presents for consideration Clark's attitude only.

We regard this action as one brought to collect from Clark, a stockholder in the Fourth of July Mining Company, a corporation organized under Chapter 25 of the Fifth Division of the Compiled Statutes of the State of Montana (1887), the amount of a judgment debt against the corporation, under the provisions of section 457 of chapter 25.

That section provides as follows: "The stockholders of every company incorporated under the provisions of this article (chapter) shall be severally and individually liable to the creditors of the company in which they are stockholders, to the amount of unpaid stock held by them respectively, for all acts of and contracts made by such company, until the whole amount of capital stock subscribed for shall have been paid in."

The respondent's complaint is in the nature of an equitable petition, instituted in behalf of himself and all the creditors of the corporation, upon the ground that defendant holds a large amount of unpaid stock, and that by the statute he is individually liable to the amount of such unpaid stock for the acts of and contracts made by the Fourth of July Company, until enough of the capital stock held by him shall be paid in to satisfy respondent's claim. That such is the main theory

upon which the respondent proceeded is evident by the pleadings, by the evidence, and by the judgment. The complaint substantially averred that defendant Clark owned 173,800 shares of the stock of the company; that 750,000 shares were transferred for a seven-eighths interest in a mine, worth no more than $75,000; and that the trustees, of whom defendant was one, knew, at the time of the conveyance of the mining interest referred to, that such seven-eighths interest was worth no more than $75,000; that the defendant and certain others, knowing that the mine was not worth more than $75,000, agreed to organize the corporation, and that the capital stock thereof should be $7,500,000; that each member of such association agreed to take, and did take, a certain number of shares in the company, at 25 cents per share; that defendant, having taken his shares with the full knowledge that the par value of the stock exchanged for the mining property was grossly in excess of the true value of the property, and, having full knowledge of the transaction antecedent to the issuance of the stock, thereby became the holder of unpaid stock except in the proportion of $75,000 to $7,500,000. The prayer is to have defendants decreed to be holders of unpaid stock, and that they each pay into court the amount to which the stock held by him is unpaid, until enough shall be paid to satisfy plaintiff's claim.

These allegations were sufficient to permit plaintiff to prove that the stock had not all been paid in, as required by Section 458, Fifth Div., Compiled Statutes, which is as follows: "The trustees of such company may purchase mines, manufactories and other property necessary for their business, and issue stock to the amount of the value thereof in payment thereof, and the stock so issued shall be declared and taken to be full stock, and not liable to any further call; neither shall the holders thereof be liable for any further payments under the provisions of section 457 of this chapter; but in all statements and reports of the company to be published, this stock shall not be stated or reported as being issued for cash paid into the company, but shall be reported in this respect, according to the facts." (*Boynton* v. *Hatch*, 47 N. Y. 225.)

The findings establish that the stock was not paid in as required, and that the seven-eighths interest in the mine was worth only 1⅜ per cent. of the paid up value of stock exchanged for it. Evidential matters contained in the complaint, reciting the history of the formation of the corporation and the *modus operandi*, are not inconsistent with the theory pursued, and upon which recovery was had. It may be true that plaintiff believed that actual fraud was a necessary element of his case—that is, that, to recover, it was essential to prove that defendant intended, when the exchange of the stock for the mine was made, to relieve himself from personal liability to the stock that he might acquire; but, even so, still plaintiff should not be turned out of court unless actual fraud is necessary in order to prove the statutory liability. If fraud can be proved by showing that the managers of a corporation have advisedly issued stock for property the par value of which stock was known at the time of its issuance to be grossly in excess of the fair value of the property acquired by the company, the plaintiff, in an action to enforce the individual liability of a stockholder who has taken with full knowledge of the state of affairs, can recover upon allegations sufficient to admit such proof, even though he has failed to prove other allegations in his pleading wherein he has charged actual intentional fraud on the part of the shareholder sued. This is upon the principle that if a plaintiff aver more than is necessary, and fail to sustain immaterial and redundant averments, but does prove all the material facts upon which a right to relief is based, and no motion to correct the pleading has been made, it will be treated as sufficient, and the surplus allegations disregarded.

Defendant's counsel, though, exaggerated the difficulty complained of. There was no misunderstanding of the real basis of plaintiff's cause of action when they wrote their supplemental brief, wherein they argue that it appears from the pleadings, and particularly from plaintiff's complaint, that plaintiff did not rely and could not have relied upon the fraud which is made the basis of this action, for the reason that

plaintiff asserts his cause of action against the company is by reason of a judgment, on account of personal injuries. Again, they thus refer to plaintiff's attitude: "He invokes the rule * * * that the persons who perpetrated the fraud of which he complains are personally liable to him because of the fraud which they perpetrated, and at the same time shows that he could not have relied upon any such fraudulent misrepresentation, and that he could not have been induced to take the company as his debtor or to become the creditor of the company upon the theory that the shares of stock were fully paid up, and that the corporation had $7,500,000 worth of assets." Appellant's counsel then argue that plaintiff has not brought himself within the rule of equity which he invokes, but from which he "has expressly excluded himself by his pleading."

Respondent is not denied relief in equity. The statute imposing the individual liability upon the shareholder prescribes no remedy, and gives no form of redress. In this respect it differs from somewhat similar laws of several states; for instance, Missouri, where, under Section 2517, Revised Statutes of Missouri, 1889, execution may run directly against a shareholder for his liability on unpaid stock, where a judgment creditor of the corporation has issued execution, and the same has been returned *nulla bona*. But the great current of authority is that creditors in such suits may go into courts of equity, which will afford adequate remedy. (*Norris* v. *Johnson*, 34 Md. 485; *Harris* v. *First Parish of Dorchester*, 23 Pick. 112; *Crawford* v. *Rohrer*, 59 Md. 599; Thompson on the Liability of Shareholders, Sec. 258.)

Having now ascertained that plaintiff and defendant are not far apart in their lines of thought as to the scope of the issues raised by the pleadings and findings, we can proceed upon the deduction that there is no reliance upon actual intentional fraud; that that theory is eliminated from the case; and that, therefore, if the action can be sustained, it must be because fraud upon the law flows as a necessary legal inference from the facts that have been found.

The findings of fact adopted by the court are not attacked

for insufficiency of evidence to justify them. We have, nevertheless, scrutinized the testimony in trying to arrive at a proper answer to the main legal proposition necessary to be decided. We have viewed the matter from several standpoints. We have considered that it was a mine that the corporation was giving its stock for, and that the purposes of the company were mining; also, that the value of mining property is honestly often immoderately rated by those who estimate its probable value by some slight indication of an ore body of commercial worth. We have considered the showing made by the development work on the property when the corporation was created. We have made every reasonable allowance for the unwarranted hopes of fortune that doubtless filled the minds of the defendant and his associates when they launched their enterprise upon the commercial world. We have even included allowances of fair profit to the promoter in trying to get at the fair value of the entire property as it was turned over to the company. But with all this there is nothing to contradict or shake the effect of the evidence from which it appears so clearly that there was absolutely nothing substantial upon which any man possessed of the most ordinary business capacity could have believed that $7,500,000 was the reasonable value of a seven-eighths interest in the Fourth of July Mine. It must therefore stand as true that the property which the corporation received from Pardee as full payment for the stock was worth only $125,000 when turned over to the company.

Authority to trustees of corporations to purchase mines, manufactories, and other property necessary to their business, and issue stock to the amount of the value thereof in payment therefor, which stock so issued shall be declared and taken to be full-paid stock not liable to any further calls, is a specific grant of power to buy any species of property necessary to the business of the company by paying therefor in stock; but, in exercising the authority given, the par value of the stock so issued must be put against the fair value of the property purchased. The language "to the amount of the value

thereof," used in section 458, means the actual or the fairly estimated value of the property exchanged for the shares of stock delivered in payment. Constructions of the language quoted which permit any valuation to be put upon the property which the parties to the transaction please, and to issue in payment therefor stock of a par value grossly in excess of the true value of the property, we believe to be evasive and erroneous. The statute neither allows a grossly excessive value to be put upon the property sold in order to deliver it over in consideration of a large amount of stock, the par value of which is far in excess of the fair value of the property, nor does it authorize property to be sold at far less than its value, in consideration of payment in stock worth on its face more than the property so acquired actually or fairly estimated is worth.

Corporations are generally formed to execute undertakings which individuals cannot carry out with safety or facility, and to avoid personal liability in execution of such projects. But the legislature prescribes the terms of the contract entered into between the people and the incorporators. Entire immunity from individual liability is not invariably incidental to the grant of a charter or articles of corporate existence. If legal conditions are complied with by the organizers of corporations, the immunity follows as a matter of law; but, if they are not, an individual liability to the shareholders arises, imposed by the same power which granted the right of corporate existence, and whereby creditors may make their claims good. Such we believe to be the correct rule, and such we think is the doctrine announced by the courts and text writers who have reasoned upon the sounder principles of law. We shall not attempt to do more than cite a few recent cases which sustain our views in clear and unmistakable language.

The supreme court of the United States, by Justice Hunt, in *Upton, assignee*, v. *Tribilcock*, 91 U. S. 45, announced this salutary rule: "The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund, of which the directors are the trustees. It is a trust to be man-

aged for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one, and cannot be disregarded. Its violation will not be undertaken by any just-minded man, and will not be permitted by the courts. The idea that the capital of a corporation is a football to be thrown into the market for the purpose of speculation, that its value may be elevated or depressed to advance the interests of its managers, is a modern and wicked invention. * * * The capital paid in and promised to be paid in is a fund which the trustees cannot squander or give away."

Within these principles, many courts of the highest respectability have laid down rules we have stated. The use of the term "trust fund" we approve of as understood by the late decision of the supreme court in *Hollins* v. *Brierfield Coal and Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, and as substantially followed by our court in *Ames & Frost Co.* v. *Heslett*, 19 Mont. 188, 47 Pac. 805. Speaking of property held "in trust" for creditors, Justice Brewer said in the federal case cited: "Yet all that is meant by such expressions is the existence of an equitable right which will be enforced whenever a court of equity, at the instance of a proper party and in a proper poceeding, has taken possession of the assets. It is never understood that there is a specific lien or a direct trust." There is no direct and express trust attached to the unpaid liability of a stockholder as an asset of an insolvent corporation; but an equity does arise in favor of a creditor of such a corporation which will be upheld in the creditor's favor, and which will inure to the benefit of the creditor before it will be held to belong to the separate entity, the corporation itself. A simplified way of expressing the attitute of the creditors of a corporation which is insolvent towards the corporation is to say that in such an event "all the creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders." (*Wabash, St. Louis and Pacific Railway* v. *Ham*, 114 U. S. 587, 5 Sup. Ct. 1081.) That the liability for un-

paid stock is an asset of an insolvent corporation has been frequently decided. (*Sanger* v. *Upton*, 91 U. S. 56; *Hawkins* v. *Glenn*, 131 U. S. 319, 9 Sup. Ct. 739; *Hatch* v. *Dana*, 101 U. S. 205; Beach on Private Corporations, Section 117.)

Judge Peckham, in 1890, announcing the unanimous opinion of the court in *Gamble* v. *Q. C. Water Co.*, 123 N. Y. 91, 25 N. E. 201, construed the manufacturing act of that state, which is similar to Section 458 of the Montana Compiled Statutes. He said: "We think that, under the manufacturing act, the company cannot issue its stock as full paid at anything less than its par value. The act makes special provision for the exercise of the power to issue stock in payment for property purchased by the company. Whatever the right of a corporation under the general powers pertaining to it as a corporation might be, we must look to the provisions of the statute where it specifically grants such power to find the terms and conditions upon which it is to be exercised. By Section 2 of Chapter 40 of the Laws of 1848, the trustees of a manufacturing corporation, founded under the act, are empowered to purchase property necessary for their business, and to issue stock to the amount of the value thereof in payment therefor; and the stock so issued shall be declared and taken to be full paid stock, and not liable to any further calls. We think this language must mean that the amount of the nominal or par value of the stock must be put against the value of the property purchased; otherwise, we should have such a case as $100 in cash purchasing $100 of stock at par, under a subscription to the capital stock of the company, while the same $100, if first turned into property to be sold to the company, might purchase double the quantity of the stock if the stock were only of the actual value of 50 per centum of its par value. The stock would issue only at its actual value in return for property, but, in return for cash, it would only issue at its par value. In other words, if the stock were really worth but 50 per cent. of its par value, actual cash would purchase only half as much stock as could

be purchased with an equal value in property. This was never meant. And I think the expression that the stock thus issued for property purchased is to be taken as full paid up stock, and that it is to be issued to the amount of the property purchased, must mean that it is to be issued at its par value.

"It may be said that this construction prevents a corporation from purchasing property and paying for it with its stock, where actual value of the stock is enough below its par value to make the difference in a large purchase very appreciable. That may be so. But it was undoubtedly the object of the statute to make the full-paid stock that is issued the representative, dollar for dollar, of the money or property that has been paid in for its purchase, so that the company would start off in business with money or property of the full value of its paid-up capital."

The supreme court of Missouri, with no dissent, in the very late case of *Van Cleve* v. *Berkey*, 44 S. W. 743 (decided the same week that the case before us was submitted), in construing a statute permitting subscribers to pay for stock by labor done or property actually received, said: "Where the law permits subscribers to pay for stock by labor done or property actually received, it means that the corporation must receive in labor or property what it was reasonably worth in money. Corporations must own property for the purposes of their legitimate business, and, if a man contracts to take shares in the corporation, he must pay for them, to use a homely phrase, 'in meal or in malt.'' He must either pay in money or in money's worth. And it is the rule laid down by the supreme court of this state, which the learned referee seems to have overlooked, that the property or labor turned into the corporation as payment for shares of stock must be a fair, just, lawful, and needed equivalent for the money subscribed."

In *Wallace* v. *Carpenter Electric Heating Manufacturing Co.*, 73 N. W. 189, decided in December, 1897, the supreme court of Minnesota used the following apt language: "A certificate for paid-up shares in a corporation is simply a written statement in the name of the corporation that the holder

thereof is a stockholder, and that the full par value of his shares has been paid to the corporation. If the shares in fact have not been so paid for, the certificate that they have been is a false representation that the assets of the corporation have been increased to the amount of the par value of the stock so issued. And, when a corporation represents that it has a paid-up capital of a given amount, it represents to the business world that, at the time it issued the stock, it received money or property to the full par value of its stock. The issuing of the stock of a corporation as paid up when it is not so in fact is a public and a private wrong—a cheat and a fraud—which enables the corporation to obtain credit and property by false pretenses. Ethically the legislature might, with the same propriety, authorize an individual to misrepresent his assets for the purpose of obtaining credit as to authorize a corporation, other than a mining corporation, to issue watered stock."

In *Stout* v. *Hubbell*, 73 N. W. 1060, decided after the case at bar was submitted, the supreme court of Iowa said: "For this court has held, as to creditors of a corporation, that when property is received by the corporation, at an excessive valuation, in payment for shares of its capital stock, it is only a payment to the extent of the value of the property received, and that owners of such stock are liable to creditors for the difference between the actual value of the property and the face value of the stock."

To like effect are the somewhat older but modern decisions in *Elyton Land Co.* v. *Birmingham Warehouse & Elevator Co.*, 92 Ala. 407, 9 South. 129; *Wetherbee* v. *Baker*, 35 N. J. Eq. 501; *Bailey* v. *P. & C. Coal & Coke Co.*, 69 Pa. St. 334; *Douglass* v. *Ireland*, 73 N. Y. 100; *Goodrich* v. *Dornan*, 14 N. Y. Supp. 879; *Roman* v. *Dimmick*, (Ala.) 22 So. 109.

There have been numerous contrary decisions, a leading case being *Phelan* v. *Hazard*, 5 Dill. 45, Fed. Cas. No. 11,068, cited to us by appellant. But, not stopping to distinguish the cases, the courts of the United States have not of late followed

Phelan v. *Hazard*; and we believe it can be safely said that there has been a steady advance in later years to the view that, in exchanging stock for property under a statute similar to section 458, each must be valued honestly at its fair worth, and the amount of stock issued as paid up shall not be greater than the value of the property purchased.

This brings us to the contention that there can be no liability unless it is proven that the shareholder, in assenting to the purchase of property for stock and the overvaluation thereof, and in capitalizing the enterprise, actually intended to perpetrate a fraud upon the creditors of the corporation; in other words, that he intended actually and by furtive motive to perpetrate a fraud. Bearing in mind always that this appellant, Clark, was one of the original parties to the purchase of the mining property referred to in the findings, and actively participated as a trustee in the company formed, and immediately thereafter became a stockholder, with full knowledge of the fact that the stock had been paid for by a seven-eighths interest in the mine, which was knowingly grossly overvalued, the application of the law becomes quite simple. Upon this question, too, there are decisions in support of the appellant's theory, but again we shall curtail the results of our investigation by observing that in the later opinions those principles obtain which we believe to be the more just to creditors generally. Upon what rational basis can it be said that the trustees or shareholders of a corporation have a right to deliberately take, in payment for the stock of the company, property intentionally and most unfairly overvalued? Where is the authority to do it? What the justification for it in the code to which the trustees must turn? These questions are not replied to by saying that the common law permitted such a practice; for, if it did, Section 458 of the Laws of Montana (Compiled Statutes 1887), and the constitution (section 10, article 15), do not. Certainly, the common law did allow directors of a corporation to receive property or services in payment for stock, either from original subscribers or from those to whom the original subscribers sell stock; but whether the

common law sanctioned an intentional gross overvaluation of property sold for stock in the corporation is, at least, doubtful. To pursue that inquiry, however, is not important, for the statute (section 458) is the specific grant of power under which the conditions are prescribed as to when the stock is paid up when it has been issued for property, and to that directors and shareholders must look for a guide in their conduct in and about such transactions, while section 457 creates the liability.

In *Terry* v. *Little*, 101 U. S. 216, Chief Justice Waite said: "The individual liability of stockholders in a corporation is always a creature of statute. It does not exist at common law. The first thing to be determined in all such cases is, therefore, what liability has been created?"

In *Camden* v. *Stuart*, 144 U. S. 104, 12 Sup. Ct. 585, Justice Brown clears up evident misapprehension of the former decisions of that court by the following statement: "In view of our decisions in *Sawyer* v. *Hoag*, 17 Wall. 610, *Scovill* v. *Thayer*, 105 U. S. 143, and the numerous cases arising out of the failure of the Great Western Insurance Company, it is manifest that the resolution adopted at the directors' meeting of December 29, 1880, that, upon paying $4,000 or their proportions of the same, the capital stock of $150,000 should be deemed to be fully paid, was wholly ineffectual as against the creditors of the company. It is the settled doctrine of this court that the trust arising in favor of creditors by subscriptions to the stock of a corporation cannot be defeated by a simulated payment of such subscription, nor by any device short of an actual payment in good faith. And, while any settlement or satisfaction of such subscription may be good as between the corporation and the stockholders, it is unavailing as against the claims of the creditors. Nothing that was said in the recent cases of *Clark* v. *Bever*, 139 U. S. 96, 11 Sup. Ct. 468, *Fogg* v. *Blair*, 139 U. S. 118, 11 Sup. Ct. 476, or *Handley* v. *Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, was intended to overrule or qualify in any way the wholesome principle adopted by this court in the earlier cases, especially as

applied to the original subscribers to stock. The later cases were only intended to draw a line beyond which the court was unwilling to go in affixing a liability upon those who had purchased stock of the corporation, or had taken it in good faith in satisfaction of their demands."

And in *Lloyd* v. *Preston*, 146 U. S. 630, 13 Sup. Ct. 131, it was held a *bona fide* creditor of a corporation could enforce actual payment by the subscribers to the capital stock of the company where the evidence was convincing that the overvaluation of the property transferred to the railway company in pretended payment of the subscription to the capital stock was so gross and obvious as, in connection with other facts, clearly established a case of fraud.

It is not necessary to show an actual fraudulent intent in order to establish a legal fraud. "Simulated payments," as the supreme court in *Handley* v. *Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, calls payments of subscriptions to capital stock where property is grossly and obviously overvalued, do not constitute excuses for defeating the trusts arising in favor of the creditors of a corporation.

The quantum of proof essential in actions similar to this one has been directly considered by several courts. In *Douglass* v. *Ireland*, 73 N. Y. 100, it was said: "A deliberate and advised overvaluation of property * * * is a fraud upon the law. * * * It is in a direct violation of the policy as well as the terms of the law, which demand payment either in money or property at its value of all the capital stock of the company as a condition of immunity to the stockholders from liability for debts of the corporation. The payment of an amount for property in excess of its value does not depend upon any fraudulent intent other than that which evidenced by the act of knowingly issuing stock for property to an amount in excess of its value. All that is necessary to establish the legal fraud and take the stock issued out of the immunity assured to stock honestly issued * * * is to prove two facts: (1) That the stock issued exceeded in amount the value of the property in exchange for which it was issued, and (2)

that the trustees deliberately, and with knowledge of the real value of the property, overvalued it, and paid in stock for it an amount which they knew was in excess of its actual value."

The property in that case was worth $68,000, the capital stock issued being $300,000. This case last cited was approved of in the later case of *National Tube Works Co.* v. *Gilfillan*, 124 N. Y. 302, 26 N. E. 538. There the property was found to be worth $75,000, but it was procured by giving $300,000 worth of stock for it. The court approved of a charge to the jury directing them that "the fraud is consummated by the issue of stock as full-paid stock which has not been fully paid; and it does not depend upon any fraudulent intent other than that which is evidenced by the act of knowingly issuing stock for the property in an amount in excess of its value. All that is necessary to establish legal fraud is proved in two facts," etc. The court even went to the extent of holding that there is "no exemption from liability because credit was imprudently given by the creditor, or because he supposed that the property of the corporation was sufficient to pay its debts."

The New York cases are approvingly upheld in the very able opinion of the supreme court of Missouri in *Van Cleve* v. *Berkey*, *supra*, where the court said it was satisfied that the weight of American authority was against the appellants' contention on the facts of that case, and that the appellants were liable without other proof of fraud than was afforded by the transaction itself. The transaction spoken of was this: A corporation was organized under the laws of Illinois, and was to have a capital of $100,000, subscribed by the parties in interest to whom the full amount of stock as subscribed was issued as full paid, in consideration of a transfer to the corporation of an invention of little actual value. The evidence showed that all the defendants acted in good faith so far as their actual intentions were concerned, and none of them was moved by any actual fraudulent intent in the transaction. About 10 per cent. of the amount subscribed was advanced by the original subscribers, but one B. received $90,000 of the capital stock of the corporation for an invention.

Upon the question of fraud the case is parallel to this. The court also adopts the language of the supreme court of Alabama in *Elyton Land Co.* v. *Birmingham Warehouse & Elevator Co.*, 92 Ala. 423, 9 South. 129, disapproving of the statements made by Mr. Cook, in section 47 of his book on Stocks, Stockholders and Corporation Law, to the effect that attempts made, in instances where stock was issued for the property taken at an overvaluation, to hold the party reciving such stock liable for its full par value less the actual value of the property received from him, have usually been unsuccessful.

The supreme court of Nebraska, in *Gilkie and Anson Co.* v. *Dawson Town & Gas Co.*, 64 N. W. 981, expressly lay down what is sufficient proof in accordance with the New York decisions. Judge Harrison, for the court, said: "Where an agreement is made whereby stock is knowingly and advisedly issued as paid in full, though but partially paid for, it may be set aside by creditors, and the enforcement of payment in full of the subscription for the stock obtained for the satisfaction of the debts of the corporation. * * * Where property is conveyed to a corporation as payment of a subscription for stock, it is insufficient to satisfy the liability of subscribers to the creditors of the corporation if there has been a fraudulent overvaluation of the property—an over valuation knowingly and advisedly made."

Clark on Corporations, in a logical discussion of the proposition, says that the better opinion is that an actual fraudulent intent need not be shown in order that the person who pays for his stock in property may be held liable to creditors on the ground that the property was overvalued. His summary of the law is as follows: "Laying aside all questions as to whether there is an actual intention to defraud, such transaction would be a fraud in law, both upon dissenting stockholders and upon persons dealing with the corporation on the faith of its stock being fully paid up, and it would be just as invalid as against creditors as a payment for stock in money at a discount. If the nature of the property and the extent

of the overvaluation are such that the overvaluation may possibly have been due to error of judgment, then, to render the transaction invalid as against creditors, actual fraud must be shown, and the question is one of fact. If, on the other hand, the overvaluation is so gross and obvious that it could not have been due to mere error of judgment, the transaction will be held fraudulent as a matter of law. This seems to be the fair result of the cases, if the opinions are read in the light of the facts actually before the court."

In *Northwestern Mutual Life Ins. Co.* v. *Cotton Exchange Real Estate Co.*, 46 Fed. 22 (decided in 1891), a bill was brought by a judgment creditor of a corporation, alleging, in substance, that the stock of the corporation of the value of $125,000 was paid by conveying a lot and building at a valuation of $200,000, but which in reality was only worth $157,000. The bonds of the corporation, secured by mortgage on the building, were issued to the defendants to make up the deficit, the defendants being stockholders and directors in the company which owned the building and made the conveyance, and they personally knew of the overvaluation, and were benefited by it. The same arguments were advanced before Judge Thayer that are usually advanced in like cases, namely, that the bill did not show that there was any fraud in the transaction by which the stock was paid for, inasmuch as it did not aver that the stock was intentionally overvalued. Judge Thayer decided that the persons to whom the stock was issued were aware of the overvaluation, and, although the bill was said to show no actual fraud in the transaction, the court regarded an intentional overvaluation of property to the extent and made under the circumstances disclosed by the bill as fraudulent, "in the sense that a complainant is bound to allege and prove fraud. * * * The law regards such a transaction as constructively fraudulent so far as the corporation's creditors are concerned; or, to state the proposition in a different form, the payment of a stock subscription in such manner and under such circumstances is invalid, and not binding on a creditor of the corporation, and, where the law de-

termines the quality of a transaction described in a pleading, it is unnecessary to aver that it was invalid or fraudulent." The learned judge who decided the last referred to case had before him, and which was binding upon him, the case of *Coit* v. *Gold Amalgamating Co.*, 119 U. S. 343, 7 Sup. Ct. 231 (decided in 1886), which is quoted as holding to the doctrine that actual fraud, as heretofore defined, must be shown by a creditor seeking to fix the individual liability of a shareholder. But it is plain that nothing in that decision was regarded as inconsistent with the rule laid down in the New York decisions heretofore cited. *Coit* v. *Gold Amalgamating Co.* was an action by a judgment creditor against the defendant company to compel the stockholders to pay what he claimed was due and unpaid on the shares of the capital stock held by them. The capital stock was fixed at $100,000 and the property was turned over for that amount of stock. It was said that, although "the corporators may have placed too high an estimate upon the property, its valuation was honestly and fairly made." The court, after saying that, where full-paid stock is issued for property received, there must be actual fraud in the transaction to call stockholders to account, added: "A gross and obvious overvaluation of the property would be strong evidence of fraud." We fail to see where this language at all conflicts with the opinion of Judge Thayer in *Northwestern Mut. Life Ins. Co.* v. *Cotton Exchange Real Estate Co.*, *supra*, or with our own view that when there is superadded to a gross and obvious overvaluation the element of deliberation in having grossly overvalued the property, and knowledge in having done so, fraud is a necessary legal inference from such facts, for in such a case good faith in valuing the property is entirely wanting. It is a fraud upon the law.

So, also, in *Thayer* v. *El Pomo Mining Co.*, 40 Ill. App. 344, it was decided that the stockholders in an insolvent corporation were liable to creditors unless they had given for their stock "the equivalent of money or in money's worth." That was a mining case, and the corporation was organized with a capital of $1,000,000, divided into $10 shares. The appel-

lant recovered a judgment against the corporation, which, being unsatisfied, he sought to make good under the statutes making the stock of shareholders liable. The property transferred to the corporation was worth but little more than 10 per cent. of the amount of the stock of the company. There, as in the case at bar, it was considered a fair conclusion that none of the incorporators had any idea that the property was worth a million dollars, but adopted that sum as a convenient one for the amount of stock to be issued. As between themselves, connected with the organization, the court said there could be no ground of complaint; but, as to creditors, the law regarded the nominal capital of the company, besides its actual assets, as a fund to which they might look for satisfaction. From many former cases in Illinois the rule was deduced that the stockholders of an insolvent corporation will be liable to creditors unless there has been given for the stock the equivalent of money or in money's worth. "No fiction," say the court, "however innocently adopted, is a defense against creditors." In the latest decision in Illinois (1895)—*Coleman* v. *Howe*, 154 Ill. 458, 39 N. E. 725—entire good faith in valuing property is required, and "where the overvaluation is so great that the fraudulent intent appears on its face, and is not explained, the court will hold it to be fraudulent, as a matter of law."

In *Elyton Land Co.* v. *Birmingham Warehouse & Elevator Co.*, *supra*, it was held that the absence of fraudulent motive on the part of a trustee does not give validity to a mere simulated execution of the trust. An averment of fraud in reference thereto is unnecessary.

In the expression of the foregoing views of our own and those adopted by us from other courts, we do not mean to be understood as going to the extent of holding that a stockholder may be successfully charged by a creditor of a corporation as a holder of unpaid stock where the property given in exchange for the stock does not eventually prove to be as valuable as it was believed to be at the time of the transfer, nor that unwise judgment or indiscretion alone are sufficient.

The judgment of men is too apt to be erroneous in relation to the valuations of property. This is especially true in new countries, where mining excitements frequently prevail, and values fluctuate rapidly and to an unusual extent. An honest mistake of judgment would seem to be a complete defense to such an action, but no such feature is presented in the case under consideration. Good faith in the valuation put upon the property is what the law demands, and all that it demands. By good faith is meant actual belief in the value put upon the property—the belief that a prudent and sensible business man would hold in the ordinary conduct of his own business affairs. Beliefs based upon visionary speculative hopes, unwarranted by existing conditions or facts, and without reasonable evidence from the then present appearances, are not such beliefs as will relieve the shareholders. Such is the true rule, we think, and such is the one that the law intends shall be applied.

Higher authority than the statutes also exists to prohibit a corporation's issuing stock except for property actually received. The constitution of the state (section 10, art. 15) provides as follows: "No corporation shall issue stocks or bonds, except for labor done, services performed, or money and property actually received; and all fictitious increase of stock or indebtedness shall be void. The stock of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding a majority of the stock first obtained at a meeting held after at least thirty days' notice given in pursuance of law."

In *Elyton Land Co.* v. *Birmingham Warehouse & Elevator Co.*, *supra*, a clause in the constitution of Alabama, almost identical with section 10 quoted, was construed as effective against transfers of property deliberately and intentionally overvalued to corporations for their stock. We approve of this construction.

The constitution of Missouri (art. 12, section 8) contains a substantially similar clause; and in *Van Cleve* v. *Berkey*, *supra*, the supreme court decided it applied to a case like the

one before us, saying: "It is impossible to escape the conviction that in this state, whatever may be the case in some of the other states, the 'American trust doctrine,' as suggested by Mr. Justice Harlan, has indeed been re-enforced by its constitution and statutes, and that the proposition that the stock of a corporation must be paid for 'in meal or in malt'—in money or in money's worth—is not a mere figure of speech, but really has the significance of its terms; it may be paid for in property, but in such case the property must be the fair equivalent in value to the par value of the stock issued therefor; that it is the duty of the stockholders to see that it possesses such value; that when a corporation is sent forth into the commercial world, accredited by them as possessed of a capital in money, or its equivalent in property, equal to the par value of its capital stock, every person dealing with it, unless otherwise advised, has a right to extend credit to it on the faith of the fact that its capital stock has been so paid for, and that the money, or its equivalent in property, will be forthcoming to respond to their legitimate demands—in short, that it is the duty of the stockholder, and not the creditor, to see that it is so paid."

Earnestly have appellant's counsel sought to convince us that mining corporations are *sui generis*, and that the doctrine of liability of shareholders for unpaid subscriptions, when stock has been issued for property at an overvaluation, is not applicable to such bodies. To fortify their arguments, they rely upon Judge Hoffman's opinion *in re South Mountain Con. Min. Co.*, 7 Sawy. 30, 5 Fed. 403, and the opinion by Judge Sawyer in the same case, reported again in 8 Sawy. 366, 14 Fed. 347. The foundation of Judge Hoffman's remarks is based upon two notions: (1) That the amount of the capital stock of a mining corporation is usually fixed at a purely arbitrary sum, and divided into as many shares as convenience or caprice may dictate; and (2) that the capital stock of a mining company neither bears nor is intended to bear the slightest relation to the real value of the property,—"a value nearly always conjectural, and very often imaginary." A

complete answer to both points lies (1) in the constitutional provision of this state which says that "no corporation shall issue stocks except for * * * money or property actually received;" and (2) in the law (Section 458, Fifth Division of the Compiled Statutes 1887) wherein the grant of power to the trustees of a corporation to purchase mines * * * necessary for their business enables them to issue stock to the amount of the value thereof, which stock so issued shall be declared and taken to be the full-paid stock, and not liable to any further call. There was no such statute in California when the cases cited were decided, and, so far as we are advised, it does not appear that the court considered the effect of the constitutional prohibition of that state (Section 11, Article 12) against issuing stock except for property actually received. Judge Sawyer also wrote of the common custom, and said that mining corporations in California were organized and carried on upon principles in respect of their capital stock wholly different from banking and like commercial corporations having a subscribed capital stock. No reference is made to statutory rules fixing liability for unpaid shares, or extending authority to buy mines. Custom and common knowledge allowed and looked for any capitalization of a mining company, and nothing to the contrary justified the court in holding against the weight of these arguments. Such is fairly the quite persuasive reasoning of the learned judge.

Morawetz, in his valuable book, cites these two decisions, and sustains their doctrine in the following language: "While the customs of business men with regard to the methods of organizing and managing particular classes of corporations cannot control the established rules of law, such customs must often be taken into consideration in construing agreements made in view of the prevailing condition of affairs. Thus, it has long been the general practice both in New York and in California to organize mining corporations with a nominal capital bearing little or no relation to the real capital which the shareholders propose to contribute, and to issue the entire stock as fully paid up in consideration of

mines whose market value is much below the amount of the stock so issued, and whose real value is generally nothing. This practice is so universal and so notorious that a person who contracts with any ordinary mining company may usually be presumed to have contracted with a view only to such security as the property transferred to the company may furnish, irrespective of the capital indicated by its charter. A person so contracting would therefore have no equitable claim against the shareholders for unpaid capital if their shares were declared paid up as between themselves and the company. It is to be observed, also, that the nominal capital of a mining company, by the very nature of the mining business, cannot, as a rule, furnish an indication of the company's actual capital. The property of a mining company is naturally of an extremely fluctuating and uncertain character. Moreover, it is acquired for the sole purpose of being exhausted and distributed among the shareholders in the form of dividends, and not as a permanent fund with which to carry on business." (Morawetz on Private Corporations, § 830.)

The intimation that New York, like California, excepts shareholders in mining corporations from statutory liability, is inadvertent, for *Douglass* v. *Ireland*, *supra*, involved the responsibility of shareholders in a corporation for furnace and mining purposes. The two California cases alone uphold the text. As said before, however, those cases were not decided on statutes similar to the New York manufacturing act, quoted in *Boynton* v. *Hatch*, 47 N. Y. 225, and identical with the Montana statutes, and for this reason are not wholly pertinent. But we go farther, and are constrained to overthrow their fallacious doctrine of expediency, and to rest our decision upon the law as it is written, and upon the common principles of moral honesty, within its letter and its spirit.

Sifted of specious consideration addressed to judges to regard practices long prevalent in certain mining states, where no laws existed placing mining and manufacturing corporations on an equality, and the warped doctrine we are asked to lay down leads to this: Incorporators of mining companies

should be permitted to violate the law, and deliberately deceive the public, but the incorporators of manufacturing enterprises should not; and this notwithstanding the truth that the same specific statutes grant no greater powers to one than the other, and fix the same liabilities upon the shareholders in each.

Counsel assert positively that there is no such thing as the market value of a mine. This court said in *Montana Railway Co.* v. *Warren*, 6 Mont. 275, 12 Pac. 641, that even a prospect has a value. "The only questions are whether a prospect has a value that may in law be called a market value, and, if so, whether there is proof in this case of any market value. Has a 'prospect'—an undeveloped mine—any market value? A full, positive answer to that is that 'prospects' are sold in the market every day. Certainly, property so sold has a market value. The records of Silver Bow county will probably show more transfers by sale of property, such as is known as 'prospects,' than of any other kind of real estate. They are frequently sold upon execution, foreclosure and partition sales. They are subject to daily litigation in our courts." These remarks were "well said," wrote Justice Brewer in affirming that decision, in 137 U. S. 348, 11 Sup. Ct. 96. Its holding was also followed in *Maloy* v. *Berkin*, 11 Mont. 138, 27 Pac. 442, and *Railway Company* v. *Forbes*, 15 Mont. 452, 39 Pac. 571, and a like rule reiterated in *O'Keefe* v. *Dyer*, 20 Mont. 477, 52 Pac. 196. The rationale of the California cases can also be accounted for, not only by an absence of statutory conditions which confront the incorporators of mining companies in Montana, but by remembering that when the opinions of Judges Sawyer and Hoffman were delivered, in 1881, and 1882, the science of mining in Western America was and had been far behind its present systematism. The engineer of mines was by no means so accessible or so well informed by knowledge of past experience of development in mines in this country as he has since become, and the light of his professional learning was not nearly so universally spread. It was only a few years before

those decisions were pronounced that the universities of America first conferred degrees for proficiency in special courses in mining. In such surroundings, and amid the fewer opportunities for ascertaining with reasonable reliability the value of a mine, the custom of which the California judges wrote sprung up in the early days of California; and, because of its well-known origin and hold, the law and the courts were reluctant to interfere with it. But that it was a pernicious custom is indisputable. It led to deceit, and to fictitious estimates being placed on mining property by the incorporators, for their own gain. Shares in a mine, at a few cents each, allured the unsuspecting and venturesome. The experiences of the custom are filled with disappointment and ruin to investors, rich and poor. All these matters may have been the controlling reason for the adoption of the more honest policy of our laws. Judge Buck, whose opinion as a district judge was read to us on the argument of this case, adverted to the argument of custom in this way: "'This custom has made the very word 'mine' in financial centers of the world almost synonymous with conspiracy to defraud. The caution of capital has become so trepid that I believe it is no exaggeration to state that many a half-worked rich mine lies idle to-day in the mountains of this state through this cause alone."

The Supreme Court of Utah, in *Salt Lake Hardware Co.* v. *Tintic Milling Co.*, 45 Pac. 200, makes no exception in favor of mining corporations; nor does the Supreme Court of Illinois, in *Thayer* v. *El Pomo Mining Co.*, *supra;* nor does the Supreme Court of Wisconsin, in *Gogebic Inv. Co.* v. *Iron Chief Mining Co.*, 47 N. W. 726; nor does the Supreme Court of Iowa, in *Oliphant* v. *Mining Company*, 63 Iowa 332, 19 N. W. 212; nor does the Supreme Court of Oregon, in *Hodges* v. *Mining Co.*, 9 Or. 200; nor does the Court of Appeals in New York, in *Douglass* v. *Ireland*, *supra.*

But, whatever may have been the reason of the old system, things have changed. Estimating the value of a mine is no longer the result of hasty conjecture. Former methods

have given way to scientific tests, based upon geological conditions, underground surveys and measurements, careful examinations of ore in sight, the known history of ore bodies in the vicinity, the method and cost of treatment of the ore, together with facilities for its transportation to markets. Now, too, there is a known definition of rights which the courts have step by step established in expounding principles by which the miner shall have preserved to him the greatest benefit of his discovery. These reasons may likewise have weighed with the legislature when it refused to extend greater immunity to stockholders in mining than in certain other corporations formed under the laws of the state.

It is next contended that it does not appear that appellant, Clark, was a subscriber, or had ever agreed to become a subscriber, to any stock. This is upon the theory that there is no actual contract to pay on the part of the shareholders who accept stock in mining corporations as full paid without having signed a formal subscription for the same. Section 457, heretofore quoted, imposes the liability of shareholders to creditors to the amount of unpaid stock, for all acts of and contracts made by the company. Section 458, *supra*, provides that stock issued in payment for the mining property, to the amount of the value of the property, shall not be liable for any further payments under the provisions of Section 457." To give any effect at all to this clause, stock issued in payment of mining property must be included. This is obvious. It cannot mean liability to the shareholder in a manufacturing, and exemption to a stockholder in a mining, company. Failure to have signed a formal stock subscription list cannot relieve appellant. The stock was issued to him, and, with knowledge of all the surrounding facts, he became the holder of it. This was enough. See the late case of *Smith* v. *Ferris and C. H. Railway Co.*, (Cal.) 51 Pac. 710. Where stock has been issued, the holder has impliedly subscribed for it. If it has not been issued, yet he has subscribed to a formal subscription list agreeing to take it, as such subscriber, he may be deemed liable to the amount for which it

is unpaid. (Taylor on Corporations, Section 511.) The Supreme Court of Iowa, in *Jackson* v. *Traer*, 20 N. W. 764, held that the simple acceptance of stock by one who never became a stockholder by subscription rendered the holder liable. Where the person sought to be charged has already taken the stock by an acceptance of the certificates, the need of a written agreement to do that which he has done is dispensed with and the relation of shareholder exists. (*Shickle* v. *Watts*, 94 Mo. 410, 7 S. W. 274; *Lloyd* v. *Preston*, 146 U. S. 630, 13 Sup. Ct. 131; *Webster* v. *Upton*, 91 U. S. 65.)

Appellant says that plaintiff cannot recover upon the theory that there has been a fraudulent overvaluation of the property, because his cause of action arises out of tort, and not out of contract. This revives the argument already considered and disposed of—that, to recover, plaintiff must show that he relied upon the fraudulent overvaluation of the mine. Counsel overlook the full significance of the language of the statute, whereby the liability exists, not for debts due by the corporation, but for all acts of and contracts made by it. Spelling on Corporations, Section 909, says that damages arising from the commissioh of torts by a corporation's agent cannot be recovered where the liability is for debts only; but, where the terms "debts" and "liabilities" are used, "the combination seems sufficiently comprehensive to include all acts and species of obligation and wrong for which a civil action would lie, except such as are purely penal in character." "All acts of and contracts by the corporation" are very comprehensive words, and certainly afford no ground whereon the courts can exclude acts of wrong independent of contract. In an early case in New York, *Heacock* v. *Sherman*, 14 Wend. 58, the word "debt" was regarded as limited to claims arising out of contract, but the court was of opinion that the word "demand" by itself would include a claim for damages arising out of the wrong of the corporation. Many statutes imposing this individual liability upon shareholders fix it only for payment of debts contracted by the corporation; but in section 457, as if to overcome the restrictions put upon the meaning

of the term "debt" by the courts, the legislature has avoided the use of any such legal technical word, and extended the liability for all acts of, as well as all contracts by, the company. The statute cannot be evaded. Liability for acts of the corporation plainly includes liability for claims for damages consequent upon torts. (*Powell* v. *Oregonian Railway Co.*, 36 Fed. 726.) Plaintiff, claiming in tort, had to fix his claim as a creditor in order to avail himself of his remedy; hence it was obligatory upon him to first establish his claim against the corporation. We regard the liability of the shareholders under our statutes as secondary, not primary. They cannot be held until it appears that the corporation is insolvent. Thompson on Corporations, Section 3521, writes that regularly the creditor, before invoking the aid of a court of equity, must have exhausted his remedy at law; "and the usual proof of his having done so is the recovery of a judgment, and the return of an execution *nulla bona*. To like effect is Spelling on Corporations, Section 904. This appears to us to be just and equitable. (*Powell* v. *Oregonian Railway Co.*, *supra.*)

What we have already said refutes the final argument of appellant—that, if plaintiff relies upon the statutes, his action is upon a liability created by statute; hence his remedy is barred by the statute of limitations. (Compiled Statutes of 1887, Section 42, First Div., and Laws of 1893, page 50.) Respondent was injured May 26, 1891. He recovered a judgment June 28, 1894, and instituted this action August 13, 1894. When plaintiff sued for damages for his injuries, he sued the company. His claim was thereafter merged in a judgment against the corporation. Now, as a judgment creditor, he is suing other defendants—individual stockholders—to make them pay the amount of his judgment. But, as the shareholders are only secondarily liable, they could not have been proceeded against on an unliquidated demand until the judgment against the corporation was taken, or the demand was liquidated, and the company was insolvent. (*Powell* v. *Oregonian Railway Co.*, *supra.*) The better rule in such cases is that no cause of action accrues against the shareholder

until the creditor has failed to make the amount of his judgment or ascertained claim from the assets of the company, or unless, perhaps, in certain cases, it appears to be useless to proceed against the corporation. (*Hawkins* v. *Glenn*, 131 U. S. 319, 9 Sup. Ct. 739; *Scoville* v. *Thayer*, 105 U. S. 143.)

Several minor errors are assigned. They have been attentively examined, but are not well founded, and require no discussion.

The conclusions we have reached in this case are in accord with those bolder interpretations which uphold, rather than impair, the letter of the constitution and the laws of the state. Enforcement of the liability in this, the first action brought before this court involving the important questions considered and determined, may be a hardship; yet the policy upon which the statutes are founded is most wholesome. In the course of the history of the state, the maintenance of those principles which we have followed will intercept the further growth of a system by which "wildcat" corporations have done grievous wrong to the public generally.

The law has said to the incorporators of mines: "You must not issue as paid in more stock in exchange for property taken than will fairly represent what the property is worth. It thus exacts no more from you than it does from the incorporators of manufacturing schemes. You must be fair and honest in valuing your mining properties, so that your capital stock may be assumed to represent what is actually paid in. It requires no impossibilities from you, but it insists on identically the same good faith from you as a miner that it calls for from your neighbor as a manufacturer. By obeying its commands, you are perfectly free from individual liability; but, by palpably and advisedly evading them, you run the risks consequent upon your evasion."

The judgment and order appealed from are affirmed.

Affirmed.

PEMBERTON, C. J., and PIGOTT, J., concur.

21 344
24 382

W. E. DONOVAN ET AL., RELATORS, v. STATE CAPITOL COMMISSION, ROBERT B. SMITH, ET AL., RESPONDENTS.

[Submitted July 5, 1898. Decided July 11, 1898.]

Citizens of the United States who have left their former residence without intending to return, and with the intention of residing in Montana, are citizens of that state. (Sec. 71, Political Code.)

ORIGINAL APPLICATION, on relation of W. E. Donovan and others, for a writ of prohibition against the State Capitol Commission and others. Writ denied.

The evidence in the cause was to the effect that the architects with whom the respondents had contracted for plans, etc., for the State Capitol Building, citizens of the United States, had, immediately before the contract was made with them, left the place where they then resided without any intention of returning, and with the intention of going to Montana, of removing there, and establishing their citizenship in that state, and that, at the time the contract was awarded to them, they were actually residing and ever since have been residing in the State of Montana.

Campbell & Parr, for Relators.

C. B. Nolan, Attorney General, for Respondents.

PER CURIAM. This is an application for a writ of prohibition. By this proceeding the relator, for himself and other resident architects of the state, asks this court to prohibit the carrying out of a contract made and entered into on the 19th day of March, 1898, by and between the State Capitol Commission and C. E. Bell and J. H. Kent, architects for furnishing plans, specifications and detail drawings for the State Capitol Building to be erected at Helena, and for superintending the construction thereof.

The only ground on which the writ is asked is that Bell and Kent, the architects, are not citizens of the state. Upon this question we heard the evidence in open court. From this evidence it clearly appears to us that Bell and Kent are citizens of the state, and were at the time the contract was awarded to them by the commission. Section 71 of the Political Code defines who are citizens of the state. Under this section it is clear, as shown by the evidence, the architects are citizens of Montana. The writ is therefore denied.

Denied.

JOSEPH HORSKY, JR., RESPONDENT, v. PATRICK MORAN, APPELLANT.

[Submitted May 23, 1898. Decided July 25, 1898.]

Townsite Patent—Collateral Attack—Privity—Laches.

The plaintiff, who claimed title and right of possession to certain premises included within the limits of a patented townsite, a deed to which he had obtained from the probate judge, brought an action against defendant to quiet title to the same. Defendant claimed under a placer location existing at the date of the application for and entry of the townsite, but his right to which he did not assert at the time the application was made. It further appeared that for nearly twenty years defendant had allowed plaintiff to occupy the premises. *Held:* 1st. That the deed under the townsite patent was not void, and that, if voidable, defendant did not show any privity with the United States, and could not attack the townsite patent collaterally. 2nd. That the defendant had been guilty of laches and could not attack the plaintiff's title.

Appeal from District Court, Lewis and Clarke County; Horace R. Buck, Judge.

ACTION by Joseph Horsky, Jr., against Patrick Moran, to quiet title. There was a judgment for plaintiff on the pleadings, and defendant appeals. Affirmed.

T. J. Walsh, for Appellant.

Toole & Wallace, for Respondent.

PER CURIAM. Action to quiet title. The pleadings show substantially the facts to be as follows: That when the probate judge of Lewis and Clarke county, as trustee for the occupants of the townsite of Helena, made the entry of the townsite on March 2, 1869, the defendant and appellant, Moran, resided upon and was in possession of certain fractional parts of ground located on Main street, in the original townsite of the city of Helena. The townsite was platted and deeds issued to the original claimants of town lots, and in 1874 plaintiff and his predecessors in interest received deeds to the aforesaid lots in controversy from the probate judge. Plaintiff ever since 1874 has been in the exclusive and actual possession of the property sued for. In 1888 the defendant applied for and obtained a deed from the probate judge to the land in dispute.

The defendant concedes the facts claimed by the plaintiff to constitute adverse possession, but sets up that he was in possession of a validly located placer claim at the date of the application for, and the entry of, the Helena townsite, and that the deed procured by him in 1888 was obtained for the purpose of further assuring his title to the property, and to enable him to get into possession in order to prosecute the necessary development work on his mining claim, but that the plaintiff refused to recognize his right to the possession of the premises described in the deed or to allow him to enter into possession of the same. His position is that his title to the lots in controversy springs from his location of the land, embracing them as a placer claim. He makes no claim of right by reason of the probate judge having entered the lots with other lots lying within the exterior boundaries of the Helena townsite as a trustee for himself as an occupant, but relies upon the contention that the mining claim, located prior to, and in his possession at the date of, the application for the Helena townsite, was absolutely excluded from, and that the title thereto did not pass under, the United States patent to the probate judge for said townsite; that is to say, he stands upon the proposition that the plaintiff, Horsky, acquired no

rights by adverse possession to the lots in question, because the legal title to the same is still vested in the United States.

After the entry of the townsite, and prior to the time when the plaintiff became the owner of the premises claimed therein, the defendant left the state of Montana, leaving his mining claim in the possession of his agent; and he avers that during his absence, as he is informed and believes, plaintiff, without right, entered upon, and has since continued to occupy, those portions of the mining claim described in the complaint, and that in like manner other parties entered upon other portions, and continued to hold and occupy the same, and excluded the defendant from the possession thereof. He further sets up that under the laws of the United States and the rules governing mining claims he is required, so as to enable him to obtain a patent, to do certain development work, but that the plaintiff refused to permit him to enter upon the premises for the purpose of doing such work, and that any attempt upon his part to enter to do the work would subject him to a summary action and to personal violence, though defendant is, and always has been, desirous of doing such work and acquiring patent to the mining claim. Defendant's prayer is that plaintiff be dismissed, and that he (defendant) be decreed to be entitled to the possession of the premises described in the complaint, and that an injunction issue preventing plaintiff from interfering with his work of mining the property involved.

The plaintiff moved for a judgment on the pleadings, because the answer stated no defense, and was sham and frivolous, and the cause of action was barred on account of laches of the defendant, as shown by the papers and proceedings. The district court granted the motion, and rendered judgment in plaintiff's favor, declaring defendant's claim, or pretended claim, to be void and without right or equity, and ordering that the deed of the probate judge to defendant be canceled and made null and void. Defendant appeals.

The record contains the opinion of the district court. It is an elaborate review of the decisions of the supreme court of the United States bearing upon the questions involved, and

proceeds upon a recognition of the distinctions drawn by the decisions of that court between the reservation or exclusion in and from a placer patent and the doctrine of reservation or exclusion from a townsite, homestead or pre-emption patent. After careful examination of the authorities cited, and many more, we have concluded to adopt the opinion of the trial court as expressive of the unanimous views we hold upon the status of this defendant, who assails the possession and claim of title of the plaintiff, and asks affirmative relief, but who shows that he wholly neglected to assert and protect any rights he ever had as the possessor of a valid mining claim when the townsite patent was applied for, and offers no excuse for his inaction during the period of nearly twenty years after plaintiff entered upon and occupied the lots before he brought this suit, except that plaintiff refused to allow him to enter upon the premises. By his answer he shows that he has long since disconnected himself from the United States government, stands in no privity with it, and possesses no claim, legal or equitable, to the lots which plaintiff has openly, notoriously and continuously occupied for over twenty years. Defendant is without any title or claim of title at all. He is in the attitude of an intruder, and it does not lie in his mouth to be heard to assail the plaintiff's position. (*Bohall* v. *Dilla*, 114 U. S. 50, 5 Sup. Ct. 782.) The pleadings, therefore, make the case a proper one to apply the doctrine of laches, well stated by Justice Brewer in *Naddo* v. *Bardon*, 2 C. C. A. 337, 51 Fed. 495, as follows: "No doctrine is so wholesome, when wisely administered, as that of laches. It prevents the resurrection of stale titles, and forbids the spying out from the records of ancient and abandoned rights. It requires of every owner that he take care of his property, and of every claimant that he make known his claims. It gives to the actual and long possessor security, and induces and justifies him in all efforts to improve and make valuable the property he holds. It is a doctrine received with favor, because its proper application works out justice and equity, and often bars the holder of a mere technical right, which he has abandoned for years, from

enforcing it when its enforcement will work large injury to many."

Although we put our affirmance of the judgment upon the ground of laches, a majority of the court believe that the decision and reasoning of the trial court is the correct solution of the other questions discussed.

Judge Buck's opinion is as follows: "In this action the defendant, Moran, contends that the mining claim, located prior to, and in his possession at the date of, the application for the Helena townsite, was absolutely excluded from, and that the title thereto did not pass under, the United States patent to the probate judge for said townsite. If this premise is conceded, it necessarily follows that the plaintiff has gained no right by adverse possession to the lot of land in controversy, because the legal title to the same is still vested in the United States government. Defendant relies chiefly upon several decisions of the supreme court of Montana when a territory—cases in which (save *King* v. *Thomas*) conflicts arose between parties claiming title to lots in patented townsites—and claimants basing their title to the same on patents issued for mining claims located prior to the applications for the townsite patents. He cites *Silver Bow M. & M. Co.* v. *Clarke*, 5 Mont. 378, 5 Pac. 570; *Talbott* v. *King*, 6 Mont. 76, 9 Pac. 434; *King* v. *Thomas*, 6 Mont. 409, 12 Pac. 865; *Butte City Smokehouse Lode Cases*, 6 Mont. 397, 12 Pac. 858, and certain decisions of the United States supreme court on which the Montana cases depend. The decisions of the United States supreme court, in cases where conflicts have arisen between holders of quartz lode locations or patents and patented placer locations, if applicable, apparently favor defendant's contention of an absolute exclusion. (See *Mantle* v. *Noyes*, 5 Mont. 274, 5 Pac. 856, 127 U. S. 348, 8 Sup. Ct. 1132; *Sullivan* v. *I. S. M. Co.*, 109 U. S. 550, 3 Sup. Ct. 339; *Id.* 143 U. S. 431, 12 Sup. Ct. 555; *Reynolds* v. *I. S. M. Co.*, 116 U. S. 687, 6 Sup. Ct. 601; 124 U. S. 374, 8 Sup. Ct. 598; *Iron S. & M. Co.* v. *Campbell*, 133 U. S. 286, 10 Sup. Ct. 765, and *Iron S. M. Co.* v. *Mike & Starr Gold*

& Silver Min. Co., 143 U. S. 394, 12 Sup. Ct. 543.) All these cases, save *Mantle* v. *Noyes*, an equitable action, were actions in ejectment. These decisions hold that in a placer patent there are excepted and reserved, by the terms of the particular statutes regulating placer claims, from the conveyance, any vein or lode within the placer claim known to exist at the date of the application for the patent. Any prior or valid quartz location within such area is also excepted. In *Noyes* v. *Mantle*, 127 U. S., on page 353, 8 Sup. Ct. 1134, the court, however, places this latter kind of exception on the following ground: 'The section (Section 2333 U. S. Rev. Statutes, regulating placer patents) can have no application to lodes or veins within the boundaries of a placer claim which have been previously located under the laws of the United States, and are in the possession of the locators or their assigns;' and it declares that such locations have already been disposed of by the government—citing from *Belk* v. *Meagher*, 104 U. S. 279: 'A mining claim perfected under the law is property, in the highest sense of the term, which may be bought, sold and conveyed, and will pass by descent.' Whether logical or not, there is a recognized distinction in the doctrine of reservation or exclusion applied to placer patents and the one applied to pre-emption, homestead and townsite patents. The last three in this respect are classed together. (See *Deffeback* v. *Hawke*, 115 U. S., on page 404, 6 Sup. Ct. 95, and *Barden* v. *N. P. R. R. Co.*, 154 U. S., on page 322, 14 Sup. Ct. 330.)

"These placer-quartz patent cases, then, cannot control the present controversy, despite their apparent applicability by logical analogy.

"At the time of the issuance of the patent for the original townsite of Helena, the general control or supervision of the title to land embraced therein had been intrusted to the officers of the land department of the government. Whether the said land, or any portion of it, was mineral or nonmineral in character, this was true. The officers of the land department allowed the townsite entry, received the purchase price for

every portion of land included therein, and a patent was issued for the same. Under these conditions, is the patent void or voidable as to the mining claim located by the defendant?

"A patent issued by the land department of the United States, as a general rule, transfers the legal title to the land, and has attached to it all presumptions of conclusiveness. It may, however, be absolutely void on its face. And this may be shown when it is considered with reference to the statutes governing it, of which judicial notice is taken; as, for example, when the land described therein has been absolutely reserved from sale, or the government has not title to it, or the land department officers attempt to convey an unauthorized amount of land. When so void, advantage may be taken of it collaterally, in any form of action, legal or otherwise, without extrinsic proof. Such nullity may also appear and be declared from a consideration of extrinsic proof in connection with the law governing it; as, for instance, where, in a conflict between two patents for the same tract of land, each regular on its face, it is shown that the junior patent is based upon an entry and certificate of final proof and purchase prior in time to the senior patent. Of course, where it readily appears from extrinsic proof, in the light of the law, that the land department had no subject-matter on which to act, as, for instance, where the proof showed that the land embraced in the patent never belonged to the United States, or that it had been previously granted in a regular patent issued by the officers of said department acting within the scope of their authority in the land department, that it can be shown collaterally, even in an action at law, is clear. The same principle would apply where a deed on which a grantee relies is shown to be for property never owned by the grantor, or previously conveyed by him.

"In the case of the *United States* v. *Schurz*, 102 U. S. 378 (which, rather strangely, is cited in *Iron Silver Mining Co* v. *Campbell*, 135 U. S. 301, 10 Sup. Ct. 765, a placer-quartz contest), a homesteader had received a certificate of final proof and receipt of purchase price paid for his land, and the per-

sons actually contesting his title were townsite claimants. The court uses the following language: 'We are not prepared to say that if the patent is absolutely void, so that no right could possibly accrue to the plaintiff under it, the suggestion would not be a sound one. But the distinction between a void and a voidable instrument, though sometimes a very nice one, is still a well-recognized distinction, on which valuable rights often depend. If a patent should issue for land in the state of Massachusetts, where the government never had any, it would be absolutely void. If it should issue for land once owned by the government, but long before sold and conveyed by patent to another, who held possession, it might be held void in a court at law on the production of the senior patent. * * * Here the question is whether this land has been withdrawn from the control of the land department by certain acts of other persons which include it within the limits of an incorporated town. The whole question is one of disputed law and disputed facts. * * * If they (the land officers) decided erroneously, the patent may be voidable, but not absolutely void.' In this case, it is true, a contest was pending in the land office between the holder of the homestead certificate and the townsite lot claimants; the latter, no doubt, as a matter of fact, being mere trespassers, and not in a position to contest, under later authorities. (See *Smelting Co.* v. *Kent*, 104 U. S. 644.) It is true, also, that where parties have had a contest over their claims in the land department, and one has succeeded in obtaining, virtually as a result of the contest, a patent, the courts either refuse altogether or are very reluctant to go behind the decisions of the land office in the premises. (*U. S.* v. *Throckmorton*, 98 U. S. 61; *Vance* v. *Burbank*, 101 U. S. 514; *U. S.* v. *Minor*, 114 U. S. 233, 5 Sup. Ct. 836; *Steel* v. *Smelting Co.*, 106 U. S. 447, 1 Sup. Ct. 389.) But the language I have just quoted is clearly applicable, in a general way, to this question of how a patent may be attacked.

"There are certain decisions, however, often cited as holding that, even when a patent regular on its face has been is-

sued by officers of the land department acting apparently within the scope of their jurisdiction—that is to say, having a general supervision of the title to the land conveyed—extrinsic evidence may be offered in an action at law to establish, as a matter of fact, said officers had no authority to issue the patent, for the reason that the land had been previously disposed of or reserved from sale. (See *Smelting Co.* v. *Kemp*, 104 U. S. 636; *Steel* v. *Smelting Co.*, 106 U. S. 447, 1 Sup. Ct. 389, and also various decisions in which they are cited.

"It is from obscure language used in some of these decisions, mainly the phrase 'previously conveyed,' that confusion arises as to what constitutes such an absence of authority as will authorize a judgment of nullity on collateral attack. The Montana decisions relied upon by defendant indicate this confusion. A careful consideration of the case, however, satisfies me that the obscure expressions from which it results are susceptible of definite interpretation and construction. The general rule, to reiterate, is as follows: 'It has always been held that an absolute want of power to issue a patent could be shown in a court of law to defeat a title set up under it, though, where it is merely voidable, the party may be compelled to resort to a court of equity to have it so declared.' (*Sherman* v. *Buick*, 93 U. S. 216.)

"In *Doolan* v. *Carr*, 125 U. S. 618, 8 Sup. Ct. 1228, an action of ejection brought by a grantee under a United States patent to a railroad company against two persons in possession, who had attempted to file declaratory pre-emption statements for the same in the land office, but had not been permitted to do so, the court, on page 624, uses the following language: 'There is no question as to the principle that where the officers of the government have issued a patent in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law, as distinguished from suits in equity, subject, however, at all times, to the inquiry whether such officers had the lawful authority to make a conveyance of the title. But if these officers acted

without authority, if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void—void for want of power in them to act on the subject matter of the patent, not merely voidable. In which latter case, if the circumstances justified such a decree, a direct proceeding, with proper averments and evidence, would be required to establish that it was voidable, and should therefore be avoided. The distinction is a manifest one, although the circumstances that enter into it are not always easily defined. It is, nevertheless a clear distinction, established by the law, and it has been often asserted in this court, that even a patent from the government of the United States, issued with all the forms of the law, may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of showing a want of authority for its issue.'

"'The decisions of this court on this subject are so full and decisive that a reference to a few of them is all that is necessary: *Polk's Lessee* v. *Wendal*, 9 Cranch, 87; *New Orleans* v. *U. S.*, 10 Pet. 730; *Wilcox* v. *Jackson*, 13 Pet. 498, 509; *Stoddard* v. *Chambers*, 2 How. 284, 317; *Easton* v. *Salisbury*, 21 How. 426, 428; *Reichart* v. *Felps*, 6 Wall. 160; *Best* v. *Polk*, 18 Wall. 112, 117; *Leavenworth R. R.* v. *U. S.*, 92 U. S. 733; *Newhall* v. *Sanger*, 92 U. S. 761; *Sherman* v. *Buick*, 93 U. S. 209; *Smelting Co.* v. *Kemp*, 104 U. S. 636; *Steel* v. *Smelting Co.*, 106 U. S. 447, 1 Sup. Ct. 389; *Kansas Pacific Railway Co.* v. *Dunmeyer*, 113 U. S. 629, 642, 5 Sup. Ct. 566; *Reynolds* v. *I. S. M. Co.*, 116 U. S. 687, 6 Sup. Ct. 601. See, also, *Knight* v. *U. S. Land Association*, 142 U. S. 161, 12 Sup. Ct. 258.

"I cite the case of *Doolan* v. *Carr* because it is sweeping in its announcement of the right to attack a patent collaterally, and cites many decisions on the subject. But it appears in this very case that the patent to the railroad company was for lands over which, as the appellants contended, at the date of its issuance the land department had absolutely no control, as they were *sub judice*. No legal title could have passed un-

der the proof offered, as it tended to show both that the land in controversy had never been embraced in the railroad grant, and was not public when included in the patent, and the court seems to have had prominently in view the principle that in an action of ejectment the plaintiff must prevail on the strength of his own title. See page 629 of the opinion. See, also, *Steel* v. *Smelting Co.*, 106 U. S. on page 452, 1 Sup. Ct. 389, as to this principle controlling in actions of ejectment.

"Chief Justice Waite, in his dissenting opinion on page 636, summarizes his conclusions from a review of the cases cited by a majority of the court as follows: 'Many more cases of a similar character might be cited, but it is needless to pursue them further. They establish, beyond all question, that if one holds under an older title, or if he is in possession under a junior claim to represent the title of the government, he may attack the validity of the patent in a suit at law on the ground that it was issued without proper authority. On the other hand, it seems to me well settled that, if he who seeks to contest the patent is a volunteer—a mere intruder—he will not be heard;' and he cites numerous authorities sustaining this view. The main ground of his dissent was that the defendants, being mere intruders, whose pre-emption entries had never been received, were not in a position to question the patent. He quotes also in this dissenting opinion, on page 637, from the language of Chief Justice Marshall in *Hoofnagle* v. *Anderson*, 7 Wheat. 212, as follows: 'A patent appropriates the land it covers, and that land, being no longer vacant, is no longer subject to location. If the patent has been issued irregularly the government may provide means for repealing it; but no individual has a right to annul it, to consider the lands still vacant, and appropriate it to himself.' (Pages 214, 215.) 'This seems to me,' Judge Waite continues, 'to be the true rule; and one way the government may adopt to annul a patent which has been issued without authority of law is to grant the land to another, and thus clothe the new grantee with its own power to test the validity of the former proceeding to divest it of title. Such

a grantee will thus be made to represent the United States by authority, and he may sue for the land. With such a title, or something equivalent to it, the courts may properly, as has been done heretofore, allow him to assert his own title; that is, the title of the government against one which was apparently granted before. Such an attack on the title would be direct, not collateral, as authority to proceed had been given by the government for that purpose.'

"I do not think Chief Justice Waite states his views of the subject very clearly, but his collation of the authorities is convenient, and the distinction he seeks to establish between mere intruders who attempt to attack a patent collaterally and persons having a direct interest in its impeachment is apparent. In so far as his doctrine as to mere intruders being applicable in actions at law, however, it seems somewhat anomalous. It evidently is a recognition of the application of equitable principles in strictly legal actions. Equity furnishes ample relief where a patent has been issued to one when another is entitled to it. Where the land department, through mistake or inadvertence, has issued to one a patent for land to which another is entitled, equity will afford relief in a suit instituted by the government to set aside the patent. (*Hughes* v. *U. S.*, 4 Wall. 232; *U. S.* v. *Minor*, 114 U. S. 233, 5 Sup. Ct. 836; *Chandler* v. *Calumet & Hecla Mining Co.*, 149 U. S., on page 93, 13 Sup. Ct. 798.) Even without the intervention of government, equity will give appropriate relief, as between the contestants themselves, where the land department, by mistake of law or such inadvertence, has given to one man land which, on the undisputed facts, belongs to another. (*Moore* v. *Robbins*, 96 U. S. 530. See, also, *Curtner* v. *U. S.*, 149 U. S. 662, 13 Sup. Ct. 985, 1041.)

"In *U. S.* v. *Stone*, 2 Wall. 535, the court uses this language: 'A patent is the highest evidence of title, and is conclusive against the government, and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal. In England this was originally done by *scire facias*, but a bill in chancery is found a more convenient rem-

edy;' and then somewhat confusingly continues: 'Nor is fraud in the patentee the only ground on which a bill will be sustained. Patents are sometimes issued unadvisedly, or by mistake, when the officer has no authority in the law to grant them, or where another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void. The patent is but evidence of the grant, and the officer who issues it acts ministerially, and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the land department is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court.' In this action a bill of equity was filed to cancel certain patents which had been issued for lands previously segregated as a military reservation. It is at least clear from the opinion that a bill in equity was the proper remedy against these patents; and this would seem to be a recognition that they were only voidable as against the government until set aside, although the opinion states that they were void *ab initio*. In fact, the rule as to attacking a patent is not at all obscure when applied as between a patentee and the United States government.

"In the case of *Hughes* v. *United States*, 4 Wall. 232, where land had been patented to Hughes in disregard of the rights of Goodbee, and a pre-emptioner who was in possession at the time of the issuance of the patent, had paid the purchase price of the land, and held a receiver's certificate, the court said (page 236): 'When this case was here on demurrer the patent was considered by the court to be a valid instrument, conveying the fee of the United States, and, until annulled, as rendering them incapable of complying with their agreement to Goodbee or his alienees. Whether regarded in that aspect, or as a void instrument, issued without authority, it *prima facie* passed the title, and therefore it was the plain duty of the United States to seek to vacate and annul the instrument, to the end that the previous engagement might be fulfilled by the transfer of a clear title,

the only one intended for the purchaser by the act of congress. The power of a court of equity, by its decree to vacate and annul the patent, under the circumstances of this case, is undoubted. Relief, when deeds or other instruments are executed by mistake or inadvertence of agents, as well as upon false suggestions, is a common head of equity jurisdiction.'

"In the case of *United States* v. *Beebe*, 127 U. S. 338, 8 Sup. Ct. 1083, is cited the case of *Hughes* v. *United States*, *supra*, with approval. In the Beebe case fraud in the procurement was the ground on which patent was sought to be set aside, but it was claimed to be void also on the ground that at the date of the issuance of the patent the United States had no title to the land conveyed. The court denied the relief sought.

"*Curtner* v. *United States*, 149 U. S. 662, 13 Sup. Ct. 985, 1041, following *United States* v. *Beebe*, in principle, and deciding against the United States, was a case where a bill in equity was filed by the government to set aside certain lands which, by error and inadvertance and mistake on the part of the officers of the land department, had been listed to the State of California, when as a fact they had been previously granted by an act of Congress to a railroad company. The court said: 'If that action was wholly void, then it was open to collateral attack, and the railroad company and its grantees could have brought suit to test the legal title at once. (*Doolan* v. *Carr*, 125 U. S. 618, 8 Sup. Ct. 1228.) If that action was not void, but the interior department had taken mistaken views of the law, or drawn erroneous conclusions from the evidence, and the railroad company and its grantees possessed such equities as would control the legal title vested in the state and its grantees, the resort could have been had to a court of equity for relief. (*Smelting Co.* v. *Kemp*, 104 U. S. 636.)'

"If, then, even in an equitable proceeding, brought directly by the government to set aside a patent because the lands embraced in it had been previously disposed of, such a patent, in

so far as it relates directly to the government, is not as a rule considered as void *ab initio*, surely the court must regard it as having passed the legal title. This doctrine of voidability only as to the government is incidentally recognized in actions at law.

"In *Wright* v. *Roseberry*, 121 U. S. 488, 7 Sup. Ct. 985—ejectment brought by a claimant under a railroad grant against holders of agricultural patents, based upon settlements subsequent to the grant—the court says, on page 518: 'These patents were evidence that whatever title the United States then held passed to the patentees.''

"In *Bicknell* v. *Comstock*, 113 U. S. 149, 5 Sup. Ct. 399—a suit on a covenant of warranty, but as a matter of fact brought for the purpose of establishing the superiority of a title claimed under a state grant—the court said: 'It is not necessary to decide whether this patent conveyed a valid title or not. It devested the title of the United States, if it had not been devested before.'

"This language in *Water and Mining Co.* v. *Bugbey*, 96 U. S. 165, is also apposite. The court on page 167 said: 'In *Sherman* v. *Buick*, 93 U. S. 209, it was decided that the state of California took no title to sections 16 and 36 under the act of 1853, as against an actual settler before the survey, claiming the benefit of the pre-emption laws, who perfected his claim by a patent from the United States. * * * As against all the world except the pre-emption settler, the title of the United States passed to the state upon the completion of the surveys, and, if the settler failed to assert his claim or to make it good, the rights of the state became absolute.'

"There is an inconsistency in regarding the patent as voidable only so far as the United States government is concerned, but as absolutely void *ab initio* in so far as it conflicts with the right of one to whom, in the language of the cases, the land embraced in the patent has been previously disposed. To illustrate this: In *Hughes* v. *U. S.*, *supra*, Goodbee, in whose behalf the government filed the bill in equity to set aside the Hughes patent, was in possession under a certificate of pur-

chase; while in *Doolan* v. *Carr*, a suit in ejectment, the plaintiff claimed, under a patent, land in the possession of the defendants, who had not even filed pre-emption entries. Chief Justice Waite, in his dissenting opinion in *Doolan* v. *Carr*, 125 U. S. 633, 8 Sup. Ct. 1236, says: 'I feel compelled to withhold my assent to this judgment. The ground of my dissent is not that, in a proper case, the validity of a patent of the United States for the conveyance of lands may not be attacked in a suit at law by proving that it was issued without the requisite authority, but that this is not a proper case for the application of the rule. To show that I recognize the existence of the right to make such proof, if the person who offers it is in a position to do so, it is only necessary to refer to *Simmons* v. *Wagner*, 101 U. S. 260, where, as the organ of the court, I announced the decision that one in possession under a certificate issued by a proper officer in the regular course of his official duties, showing that he had bought and paid for the land, might successfully defend an action of ejectment brought against him by the holder of a patent issued upon an entry by another party made long after his rights accrued; and this because, after a purchase under which he was in possession, the land was no longer a part of the public domain, and the officers of the United States had no authority to sell it a second time. In my opinion, however, such proof can only be made by one who holds a right at law or in equity which is prior in time to that of the patentee, or by one who claims under the United States by a subsequent grant or some authorized recognition of title. Unless I have misinterpreted the cases on this subject, that has always been the doctrine of this court.'

"Judge Hanford in *Stimson Land Co.* v. *Rawson*, 62 Fed., on page 428, says: 'The decisions of the supreme court of the United States establish the following propositions: When land has been sold by the United States, and the purchase money paid, it becomes segregated from the body of the public lands, and is no longer the property of the government, but is the property of the purchaser. (*Carroll* v. *Safford*, 3

How. 460; *Witherspoon* v. *Duncan*, 4 Wall. 210; *Wirth* v. *Branson*, 98 U. S. 118; *Simmons* v. *Wagner*, 101 U. S. 260.) After a sale, until the patent is issued, the government holds the mere legal title in trust for the purchaser, and, in case of a resale, the second purchaser would take the title charged with the trust. (*Carroll* v. *Safford*, *supra*; *Lindsey* v. *Hawes*, 2 Black. 554.) When the right of a patent becomes perfect, the full equitable title passes to the purchaser, with all the benefits, immunities, and burdens of ownership. (*Benson Mining & Smelting Co.* v. *Alta Mining & Smelting Co.*, 145 U. S. 428, 12 Sup. Ct. 877.) A contract for the purchase of public land is complete when the certificate of entry has been executed and delivered. (*Witherspoon* v. *Duncan*, *supra.*) A patent certificate protects the purchaser's rights as fully as a patent. (*Carroll* v. *Safford*, *supra.*) A vested right to a patent for public land is equivalent to a patent issued. (*Stark* v. *Starrs*, 6 Wall. 402.) The execution and delivery of a patent, after the right to it has become complete, are ministerial acts of the officers charged with that duty. (*Simmons* v. *Wagner*, *supra.*)

"Conceding that Judge Hanford and Chief Justice Waite correctly declare the rule, would it not be the better legal logic invariably, where a *prima facie* holder of the legal title which has been conveyed to him by officers of the land department, who exercise a general supervision of the title, brings an action in ejectment against the holder of the equitable title in possession, to confine the latter to equitable redress? It may be, then, that too much liberality in expression has been indulged in as to allowing extrinsic evidence to be offered in an action at law by one in possession to establish a lack of authority on the part of the officers of the land department in the issuance of a patent. But, if this be true, the language in some of the quartz-placer conflict cases to the contrary notwithstanding, this liberality has been indulged in where there were defendants in possession closely connected with the government title, either legally or equitably.

"Now, what is the character of the title obtained by defend-

ant to the land in controversy from his mining location? Was the land embraced therein previously disposed of by the government as far as the townsite patent is concerned? I am well aware that in several cases, notably *Belk* v. *Meagher*, 104 U. S. 283, and *Forbes* v. *Gracey*, 94 U. S. 762, the title conferred by a mining location is spoken of in terms of such high respect as almost to justify the inference that it is on a par with a title by patent, or one based on a certificate of final proof and purchase; but surely the court, using this language in cases where vital existing rights or claims of rights were before it, did not intend such inference to be drawn and applied to all cases. Before the holder of such a claim has made proof of his compliance with the statutory requirements regulating the obtainment of a patent to his location, and paid the purchase price therefor, he has only an inchoate right to title, at best. He is under no obligation to make final proof, and pay the purchase price, so as to entitle him to patent. (*Water and Mining Co.* v. *Bugbey*, 96 U. S., on page 167.) It is well to notice here that there is a clear distinction between the holders of a valid claim whose rights are possessory only, and one who, having fulfilled all the conditions required by law, has received or is entitled to a certificate of purchase. (See *Sherman* v. *Buick*, 93 U. S. 209; *Simmons* v. *Wagner*, 101 U. S., page 260; *Stimson Land Co.* v. *Rawson*, 62 Fed. 427.)

"There is no grant in *præsenti*, under the mineral laws, to the mere locator of a mining claim. 'There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee. * * * In other words, when an immediate grant was intended, an immediate grantee, having all the requisite qualifications, was named.' (*Hall* v. *Russell*, 101 U. S. 509.) Again, the court, on page 512, says: 'Had it been supposed that the title was already in the settler, subject only to defeasance if the condition subsequent to the grant should not be performed, we cannot but think that provision would have been made for a transfer of the land free from the condition, instead of only the settler's rights.' It is true, this language is used with refer-

ence to settlers under the Oregon donation act, but, *mutatis mutandis*, I regard it as applicable.

"In the swamp land and railroad grant cases, the titles under the acts of congress are held to be grants in *præsenti*. (See *Frasher* v *O'Connor*, 115 U. S. 102, 5 Sup. Ct. 1141; *Wright* v. *Roseberry*, 121 U. S. 488, 7 Sup. Ct. 985; *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241, 12 Sup. Ct. 158; *Chandler* v. *Calumet and Hecla Mining Co.*, 149 U. S. 79, 13 Sup. Ct. 798.) There is certainly a distinction to be drawn between a title claimed merely by virtue of a valid location, without even possession, and those claimed under grants in *præsenti* or final certificates of proof and purchase. The first, as a title, is but inchoate in its nature, and, if a grant, is a grant upon conditions precedent. Of the other two, the titles under the act of congress, held conveyances in *præsenti*, are grants upon conditions subsequent, and those under certificates of final proof and purchase are placed in the same category with patents. As I have shown, townsite patents are classified with homestead and pre-emption patents, as distinguished from placer patents.

"The title conferred on defendant by virtue of his mining location was in the nature of an easement only. (*Benson Mining & Smelting Co.* v. *Alta Mining & Smelting Co.*, 145 U. S. 428, 12 Sup. Ct. 877. See *Stimson Land Co.* v. *Rawson*, 62 Fed. 426.)

"I am satisfied from all the authorities that the United States Supreme Court would regard this patent to the probate judge as only voidable under the facts presented by the pleadings in this case, even in an action at law. The phrase, 'previously disposed of,' should not be construed to include defendant's abandoned easement. I am strengthened in the conclusion that this patent is voidable only by the cases of *Davis* v. *Weibbold*, 139 U. S. 528, 11 Sup. Ct. 628, and *Barden* v. *Railway Co.*, 154 U. S. 288, 14 Sup. Ct. 1030. If they did not expressly decide, as maintained by counsel for plaintiff, that, when the officers of the land department have issued a townsite patent, they must presumably have passed

upon the mineral character of the land conveyed, as it was within their jurisdiction to do so, and that, consequently, as there was a precedent question of fact presumptively determined by them, there can be no collateral attack on such a patent, as it is voidable only, not void, they at least indicate that the court was inclined to so hold. Nor do I regard the case of *Dower* v. *Richards*, 151 U. S. 658, 14 Sup. Ct. 452, as even implicating to the contrary. It does not appear that any point was made as to the conclusiveness of the townsite patent or that the question was even considered.

"This doctrine claimed by counsel for plaintiff to have been enunciated in the Barden case would be a logical result of many utterances of Justice Field, the organ of the court in many previous cases. He says in *Davis* v. *Weibbold*, on page 528, 139 U. S., and page 636, 11 Sup. Ct.: 'If, after the introduction of the townsite patent and the deed to the defendant, the objection had been raised to the jurisdiction of the land department to issue the patent in question for minerals in lands which had been previously conveyed to the defendant, a much more serious question would have been presented.' And on pages 528, 529, he expressly denies that *Steel* v. *Smelting Co.*, 106 U. S. 447, 1 Sup. Ct. 389, authorized the location of a mining claim within the boundaries of a patented townsite. In both *Davis* v. *Weibbold* and the Barden case his citations of *Smelting Company* v. *Kemp* and *Deffeback* v. *Hawke* indicate that he even regards them as authorities in favor of the contention of counsel for the plaintiff; and in his dissenting opinion in *Iron Silver Min. Co.* v. *Mike & Starr Gold & Silver Min. Co.*, 143 U. S. 394, 12 Sup. Ct. 513, on page 416, he says: 'The presumption in favor of its validity attends the placer patent, as it does all patents of the government of any interest in the public lands which they purport to convey. So potential and efficacious is such presumption that it has frequently been held by this court that if, under any circumstances in the case, the patent might have been rightfully issued, it will be presumed, as against any collateral attack, that such circumstances ex-

isted. (*Smelting Co.* v. *Kemp*, 104 U. S. 636, 646.') The above language is substantially the same that he used in his opinion in the case of *Moffat* v. *United States*, 112 U. S. 24, 5 Sup. Ct. 10.

"I believe that, if this case was before the Supreme Court of the United States to-day, the judges would hold that in the issuance of a patent for the Helena townsite the land department presumably decided, as a mixed question of law and fact, that the defendant, Moran, did not have a valid mining location within its bounds, and that the case of *United States* v. *Schurz*, 102 U. S. 378, would be cited as directly in point.

"If, then, this patent is not void as to this lot in controversy by reason of the mining claim in the townsite at the date of the application and its entry and patent, necessarily the test to be applied is, what standing has defendant in equity as to the conveyance by the townsite patent, so far as the lot in controversy is concerned? In *Smelting Co.* v. *Kemp*, the court say: 'If in issuing a patent its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief, and even there his complaint cannot be heard unless he connects himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent, and he must possess such equities as will control the legal title in the patentee's hands. (*Boggs* v. *Merced Mining Co.*, 14 Cal, 279, 363.) It does not lie in the mouth of a stranger to the title to complain of an act of the government with respect to it. If the government is dissatisfied it can, on its own account, authorize proceedings to vacate the patent or limit its operation.'

"Does defendant by his answer show himself to be entitled to equitable relief on any of the above grounds? He admits that he has not been in possession of the lot in controversy for some twenty years. Does this sufficiently connect him with the

original source of title? Even if he were to prevail upon the United States government to file a bill to set aside this patent as to the lot in controversy, could such a bill be maintained on the facts he pleads? Certainly not, under the rule established in *United States* v. *San Jacinto Mg. Co.*, 125 U. S. 273, 8 Sup. Ct. 850; *United States* v. *Beebe*, 127 U. S. 338, 8 Sup. Ct. 1083; and *Curtner* v. *United States*, 149 U. S. 662, 13 Sup. Ct. 985, 1041. The United States is under no obligation whatsoever to reinstate him in the position he occupied as to this mining claim some twenty years ago; and under the authority of these last-cited cases and numerous others, his self-confessed laches, wholly unexplained, place him beyond the pale of any equitable relief, either directly or indirectly, through the intervention of the government.

"As to the deed obtained from the probate judge, upon which defendant relies, he himself claims that he obtained it for the purpose of assuring the title obtained by his mining location. If this be true, it should be set aside, under the view I have expressed. But if he relies upon it as an independent source of title, upon the authority of the previous decision I rendered in this case, and the opinion rendered by the Supreme Court of Montana in reviewing it (*Horsky* v. *Moran*, 13 Mont. 250, 34 Pac. 360), I must hold it to be null and void."

The judgment is affirmed.

Affirmed.

PIGOTT, J.—I concur in the judgment of affirmance upon the ground that the answer discloses no privity of defendant with the United States.

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J. L. CROWDER, APPELLANT, v. EDWARD McDONNELL, ET AL., RESPONDENTS.

[Submitted June 16, 1898. Decided Aug. 1, 1898.]

Water Rights—Tenants in Common, Contract Between—Right of Action—Pleading—Aider by Answer.

"M.," the predecessor in interest of the plaintiff, entered into an agreement with defendants, whereby he conveyed to them a right of way over his land for a ditch, became an owner in an interest in the ditch and water, and was not to pay any part of the expenses of keeping the ditch in repair. After "M." had conveyed his interest in the land, ditch and water, the defendants neglected to keep the ditch in repair, and thereby plaintiff suffered damage. *Held*, that plaintiff could not recover for damages caused by the negligent construction or location of the ditch; and that, being a tenant in common, he could not ordinarily recover damages from his co-tenants for their failure to repair the ditch; but that defendants having agreed to keep the ditch in repair, they were responsible for any damages caused by a breach of their contract.

PLEADING.—Plaintiff brought his action in tort for damages caused by failure of his co-tenants to keep a ditch in repair; defendants set up a contract whereby they agreed to keep the ditch in repair. *Held*, that plaintiff's action was one on contract; but, that the defendants having set up the contract the breach of which was the cause of the damage to plaintiff, they had supplied the averments necessary to sustain a cause of action.

Appeal from District Court, Fergus County; Dudley Du Bose, Judge.

ACTION by J. L. Crowder against Edward McDonnell and others. From a judgment of nonsuit, and an order denying a new trial, plaintiff appeals. Reversed.

Statement of the case by the justice delivering the opinion.

Plaintiff (appellant in this court) sued defendants (respondents) for damages to plaintiff's lands, and for injury to his crops, and to have defendants enjoined from using a certain irrigating ditch to plaintiff's damage. Two causes of action are relied on. For the first it is alleged that defendants are joint owners in a certain irrigating ditch, built in 1891, tapping the waters of Big Spring creek, Fergus county; that the ditch was so negligently and unskillfully located, constructed, and maintained by defendants over shale rock and gravelly

soil, that in 1895 the water percolated and flowed through the bottom of the ditch, and overflowed portions of plaintiff's land, injuring the land and destroying his crop. For a second cause of action plaintiff alleged that defendants are joint owners in the ditch; that they so negligently and unskillfully located and constructed the same across plaintiff's land as to obstruct the natural flow of waters accumulating above the ditch, which had formerly flowed away by natural channels; and that as a consequence the waters broke through the banks of the ditch, and overflowed plaintiff's lands, to his damage.

Defendants denied all allegations of negligence and damage, and set up that the land alleged to have been damaged was conveyed to plaintiff by R. R. Mills, and that, long prior to the conveyance of said land to plaintiff by Mills, Mills conveyed a right of way to defendants over the lands so conveyed to plaintiff, for the purpose of constructing said ditch and for the conveyance of the water therein, and also conveyed an interest in the ditch to plaintiff; that, under the said contract of conveyance, Mills became a tenant in common with defendants, and, if the ditch was negligently constructed, it was so constructed by plaintiff's grantor, and was accepted by plaintiff. That about March 25, 1895, in an action in the district court, this plaintiff, Crowder, sued these defendants, except the defendants R. S. and R. E. Hamilton, and obtained judgment decreeing the plaintiff to be the successor in interest of said Mills in and to 60 inches of water described in the complaint, and that plaintiff was the owner of a sufficient interest in and to the ditch involved to convey said 60 inches of water to his lands, wherefore, as the successor of said Mills, if the ditch was carelessly constructed, plaintiff, by accepting the same from his grantor is estopped to claim damages by reason of any alleged defects in the construction of the ditch; that, if the ditch overflowed its banks as alleged, it is due to the acts of the plaintiff in not properly attending to the waste gate constructed on plaintiff's lands, and which, under the decree referred to, plaintiff was in duty bound to take care of.

Plaintiff introduced considerable testimony, and at the close

of it a motion for nonsuit was interposed, based upon the grounds that plaintiff was a co-tenant and equally responsible for damages with the defendants, and that plaintiff and his grantor conveyed the right of way across plaintiff's land in consideration of the conveyance to plaintiff of 60 inches of water, and the ownership in the ditch to the extent of that number of inches of water, and that, in receiving the 60 inches of water, plaintiff waived all rights to damages under that agreement and under the decree of the court, and upon the further ground that plaintiff had failed to prove damages.

The court decided that the plaintiff was a tenant in common with the defendants, and could not sue his co-tenants for negligent construction of the ditch, inasmuch as his grantor, Mills, had accepted an interest in the ditch from the defendants. Judgment was entered for defendants, and plaintiff appeals from the order overruling his motion for a new trial, and from the judgment of nonsuit.

The court had before it the decree and judgment roll in the case of Crowder against McDonnell et al., heretofore referred to. By this decree and judgment roll it appeared that certain special issues had been found in that case, establishing the following facts: That R. R. Mills, plaintiff's grantor, was to get 60 inches of water flowing through the ditch; that Mills was to have two outlets for said water on his ranch; that the work Mills had to perform for such privileges was one-seventh of the manual labor from the beginning of the ditch to the west line of his land; that Mills was to be responsible for the proper care of the waste gate situated on the ranch during high water; that Mills was not to pay anything for the repairs of the ditch; and that Mills had not carried out his contract. All these findings were adopted and incorporated in the court's decree in the case referred to. The conclusions of law made in that decree were that the plaintiff was entitled to 60 inches of water flowing in the ditch of the defendants built across and upon the lands of the plaintiff, and was to have two points in the ditch on the lands of plaintiff wherefrom he might take and divert the water; that plaintiff was the owner of a sufficient

interest in the ditch itself to convey 60 inches of water, and that defendants should be perpetually enjoined and restrained from diverting the water, or any part thereof, or from interfering in any manner with the plaintiff in the free use of said 60 inches of water; and that the plaintiff should be responsible for the proper care of the waste gate situated on his ranch during times of high water. The decree then adjudged the plaintiff to be the owner of the amount of water aforesaid, and with the right of diverting the same as aforesaid, and with an interest in the ditch as aforesaid, and enjoined the defendants as aforesaid, and adjudged plaintiff to be responsible for the proper care of the waste gate during high water.

Wm. M. Blackford and *F. E. Stranahan*, for Appellant.

Frank E. Smith, for Respondents.

HUNT, J. The decree in the suit of Crowder against McDonnell et al., which was an action for specific performance, fixed the relationship between plaintiff and defendants as one of co-tenancy. This was a correct judgment upon the facts as found in that suit; for when Crowder purchased from Mills, one of the original owners in the ditch, the right to the use of 60 inches of the waters flowing therein, and his interest in the ditch itself, and went into possession with the defendants, he became the successor to a tenancy in common with the defendants who were also owners. (*Mining Co.* v. *Taylor*, 100 U. S. 37; *Meagher* v. *Hardenbrook*, 11 Mont. 385, 28 Pac. 451.) Regulations for the manner of use of the water by arrangement between co-tenants, or by order of the court, are not inconsistent with the relationship of a tenancy in common. "Where a ditch through which water is diverted and applied to any beneficial purpose is owned by several proprietors, and their relation is not defined by special agreement to the contrary, they are to be regarded as tenants in common of the ditch, and their rights are determined and governed by the rules of law regulating tenancy in common. As tenants in common, each one has the right to enter upon and occupy the

whole of the common property to maintain an action against any co-tenant to recover his share of the rents and profits. And where different persons separately appropriate the waters of a stream, and are severally using the same under certain regulations as to the time and manner of such use, they are tenants in common, and each of them may maintain an action to enjoin a trespasser from diverting any portion of the water thus appropriated." (Kinney on Irrigation, Section 301. See, also, Pomeroy on Water Rights, Section 63.)

These well-established rules, when applied to the facts of the case under consideration, lead to the affirmance of the general view of the learned district judge, holding that plaintiff could not recover herein for damages sustained on account of the negligent construction or location of the ditch. Mills, plaintiff's grantor, having performed one-seventh of the work of constructing the ditch from its beginning to the west line of his land, plaintiff, as his successor, cannot sustain an action against defendants, his co-tenants, for any negligence, the direct cause of which his grantor, Mills, was equally guilty with defendants. This left the action as one simply for damages resulting from the negligent maintenance of the ditch. The attention of the district court was not called to this particular allegation of negligent maintenance, nor was it adverted to or considered upon the ruling in granting the nonsuit. But the question has presented itself to us as one material to a decision. Ordinarily no action for negligent maintenance would lie by one co-tenant against another; but upon the trial of this action the plaintiff offered in evidence the judgment roll and decree in the former suit of Crowder against McDonnell et al., and thus established, as *res adjudicata*, not only a relationship of co-tenancy between his grantor and defendants, but the further fact that an agreement existed between his predecessor, Mills, and the defendants as his co-tenants, whereby Mills was relieved from responsibility for repairs upon the ditch which was the property of the co-tenants. Plaintiff, having purchased with knowledge, took the property subject to the conditions of the agreement of his predecessor with his co-tenants,

and is himself accordingly relieved from liability for repairs upon the ditch. This being so, he has a right of action for damages, if any have been suffered on account of the negligent maintenance of the ditch due to a failure to keep the same in repair. He cannot recover, as indicated above, for damages resulting from percolation or overflow due to faulty location or construction, for he is himself responsible with his co-tenants for such damages; but he can for injuries accruing by reason of a failure to keep the ditch in a state of repair, so that it will carry water for the uses of himself as well now as it did before any repairs may have been necessary; and, of course, under the statute, he can always recover for damages arising by reason of the destruction of the ditch, or resulting from an ouster, or certain other abuses to the property whereby injury resulted to the other co-tenants. But we find the record does not justify any claim upon any of such other grounds.

So there is nothing left to examine, beyond the question whether or not, under the pleadings and evidence, plaintiff made out a *prima facie* case of damages because of a failure on the part of his co-tenants to keep the property in repair. Now, the omissions of these defendants, plaintiff's co-tenants, to repair the ditch, created no general liability, and constituted no tort, independently of the agreement between them and plaintiff's grantor, which relieved such grantor from contributing to repairs. It was only by virtue of that agreement, which, fairly construed, was, in our opinion, not alone a contract to relieve Mills of contributing to repairs, but was impliedly an obligation on defendants' part to keep up the necessary repairs, that plaintiff can sue at all. He therefore had no cause of action *ex delicto*, but did have *ex contractu*. It was really the breach of a contract which was relied on by plaintiff, and his complaint should have shown, upon the face of it, what the terms of the contract were, and the facts which constituted the breach thereof. Instead of pursuing this course, however, he disregarded any co-tenancy and contract, and framed his complaint upon the theory that defendants were

liable for a violation of a general duty. The proof nevertheless showed they were not so liable, because of their tenancy in common, yet there was evidence tending to prove that they were liable upon the contract, which did away with that immunity which would have been theirs except for such contract. Defendants are not in a position to complain of this ruling, inasmuch as they pleaded the decree and judgment roll in the former suit, and by doing so established the very contract which made them liable for repairs, and which relieved plaintiff from responsibility in that respect. If the decree had found only that the relationship of co-tenancy existed, plaintiff ought to have been nonsuited; but as it, in effect, put all the parties in a position towards the contract to repair the ditch as if no such relationship existed, upon the issue of negligent maintenance for lack of repair plaintiff made out a sufficient case to go to the jury. His evidence was very meager upon the issue, but upon application for a nonsuit there was enough to have required the court to overrule the motion. It appears in testimony that the banks of the ditch were broken, and were not repaired so as to put the ditch in as good condition as it had been in former years.

The case is, therefore, brought within the scope of the rule that the facts which the plaintiff failed to properly state were supplied by the averments of the answer, together with the record of the former suit, expressly averred, and admitted to be binding in this action. (*Hamilton* v. *G. F. S. R. Co.*, 17 Mont. 334, 42 Pac. 860, and 43 Pac. 713; *Lynch* v. *Bechtel*, 19 Mont. 548, 48 Pac. 1112.) It was tried with this record in evidence; plaintiff making it part of his case by proof on trial, and defendants making it part of theirs by pleading. Under such circumstances, there was no prejudice to defendants' rights by the departure from the original theory upon which the complaint was drawn; and while the court was correct upon all the questions involved, except that of negligent maintenance, upon that one point there having been a sufficient showing to go to the jury, under proper instructions, the case must be reversed.

The judgment is therefore reversed, and the cause is remanded, with directions to grant a new trial according to the views herein expressed; costs to be equally divided between appellant and respondents.

Reversed and remanded.

PIGOTT, J., concurs.

21	374
24	104
21	374
d25	355
21	374
f26	236
f26	237
21	374
36	375
36	462
36	463
36	466

MILTON H. WILSON, ET AL., RESPONDENTS, v. B. HARRIS, ET AL., APPELLANTS.

[Submitted Feb. 24, 1898. Decided Aug. 1, 1898.]

Equity—Jurisdiction—Creditors' Suit—Prerequisites—Pleading—Evidence—Admissions—Witnesses—Assignments for Creditors—Preferences—Fraudulent Conveyances—Agency—Garnishment—Property Subject.

1. In suits brought for the purpose of obtaining equitable relief only, the court should determine *in limine* whether the facts stated are sufficient to warrant the invocation of the extraordinary powers, and the exercise of the peculiar jurisdiction, of chancery; and hence the court must decide whether the complaint states a cause of action cognizable in equity.
2. A lien on personal property capable of manual delivery, in possession of a transferee under a conveyance alleged to be fraudulent as to creditors, is not acquired by service of garnishment on the transferee, since the Code of Civil Procedure (Comlied Statutes of 1887) Section 186, Subdivision 3, provides that personal property capable of manual delivery shall be attached by taking it into custody.
3. Code of Civil Procedure (Compiled Statutes of 1887) Section 188, providing that the sheriff, on receiving information in writing that any person has personal property of defendant in his possession, shall serve on such person a copy of the writ, and notice that the property is attached, and section 190, providing for the examination under oath of one in possession of a debtor's property capable of manual delivery, and empowering the court to order same delivered to the sheriff, whose duty it would then be to attach the same, do not authorize the garnishment of a transferee of property capable of manual delivery under a conveyance fraudulent as to creditors.
4. In a creditors' suit, when the question is as to a lien claimed by plaintiffs by virtue of garnishment proceedings, an averment that any moneys, goods and effects in possession of the garnishee have been attached, which omits to state that the garnishee had such property in his possession at the time of service, is insufficient.
5. Property of a debtor, subject to execution, in possession of an assignee under a conveyance void as to creditors, may not be reached through proceedings in equity until such creditors have obtained a specific lien on the property.
6. Code of Civil Procedure (Compiled Statutes of 1887) Section 356, relating to supplemental proceedings, provides that, if it appear that a person having property of the debtor claims an adverse interest therein, the court may authorize the judgment creditor to sue to recover such interest, and may forbid a transfer thereof until an action can be commenced and prosecuted to judgment. *Held*, that the necessity of

obtaining a lien on property capable of manual delivery, in possession of an assignee under an assignment alleged to be in fraud of creditors, before suit to subject such property to the claims of creditors, is not obviated by an order of court in supplemental proceedings authorizing such suit, nor does the order protect the complaint in such suit from attack for want of equity, as construed by the rules applicable to similar suits not preceded by such order.

7. The burden of proving that a preference in a deed of assignment is fraudulent rests on the party so charging.

8. The mere fact that the relationship of parent and child exists between an assignor and a preferred creditor is not a badge of fraud.

9. In an action by creditors, attacking a sale by a mother to her daughter, proof that the mother was indebted to the daughter in a certain amount is not overcome by statements made by the mother's agent to mercantile agencies which made no specific mention of the indebtedness.

10. In a suit by creditors to have a sale of a stock of goods from a mother to her daughter set aside, it is not sufficient evidence of fraud that a son, as agent for both parties, negotiated the sale, and was afterwards in the employ of the daughter.

11. An admission by an assignor, through her agent, that a sale was not *bona fide*, made in a matter which was beyond the scope of the agent's authority, not relevant to any transaction then pending, and not referring to property in the agent's possession, should be excluded.

12. Evidence brought out on a proper cross-examination is part of the evidence given in chief for the party calling the witness.

13. The assignment of the subject matter of an agency by a principal for the benefit of creditors revokes the authority of the agent, unless that authority is coupled with an interest.

14. The good faith of an assignment for the benefit of creditors is not impeached by contradictory testimony as to acts and declarations of others subsequent to the assignment, and not participated in by the assignor.

15. A written contract attended with every presumption of validity, will not be avoided on the ground of fraud, unless the proof thereof be clear and distinct.

On rehearing. Reversed.

For former opinion, see 19 Mont. 69, 47 Pac. 1101.

Statement of the facts by the justice delivering the opinion.

Creditors' bill to avoid an assignment for the benefit of creditors made by Bathsheba Harris to Moses Morris.

Bathsheba Harris on December 14, 1891, made a general assignment for the benefit of her creditors, with preferences declared in favor of certain creditors, among whom were her daughter, Annie Harris, and her daughter-in-law, Sarah S. Harris, wife of Ben E. Harris.

From September, 1884, to October, 1891, the assignor conducted a clothing business, through the agency and management of her son, Ben E. Harris, at No. 19 North Main street, in Helena, Mont., and from October, 1891, until the time of the assignment the business was conducted in the same way at

No. 119 North Main street, in the city named; a portion of the stock in question formerly carried at the old place of business having been removed to the new place of business, and the remainder having been left at the old stand. The defendants and appellants claim that the goods left at No. 19 had been sold by the assignor to the defendants, Sax & Zekind, a partnership composed of Salina Sax, daughter of the assignor, and Carrie L. Zekind, while plaintiffs assert that the alleged sale was merely a device to conceal the continued ownership of the assignor, and made in contemplation of a subsequent assignment. Immediately after the assignment, all of the goods at No. 119 North Main street were delivered by Ben E. Harris to defendant, Moses Morris, as assignee, who subsequently sold a large portion of the goods, and collected some of the accounts, but ultimately disposed of the entire remnant of the stock of goods, and all the uncollected accounts, in bulk, to H. L. Frank, a wholesale liquor dealer, then residing in Butte.

The good faith of the assignee is conceded, but plaintiffs claim that the real purchaser at the sale to Frank was the assignor, Bathsheba Harris.

Within a few weeks after the assignment, each of the plaintiffs commenced an action in the district court of Lewis and Clarke county against the assignor, and caused a writ of attachment to be issued, directed to the sheriff of that county; and thereafter the sheriff attached under each of the writs all moneys, goods, effects, and debts due or owing, and other personal property belonging to the assignor, in the possession and under the control of defendants Sax & Zekind and the defendant Moses Morris, by delivering to each of the defendants personally a copy of each of the writs of attachment, with a notice in writing appended thereto that such credits, debts and property were thereby attached in pursuance of said writ. Subsequently each of the plaintiffs recovered a judgment against the assignor in each of said actions, and caused a writ of execution to be issued upon each of the judgments, which writs were returned by the sheriff wholly unsatisfied. After

the return of the execution issued upon one of the judgments, plaintiffs therein applied to the district court where the judgments were entered, by proceedings pursuant to the provisions of the compiled statutes then in force; and after the usual examination, it appearing therefrom that defendants Sax & Zekind and defendant Morris each claimed an interest in the property in their possession sought to be reached through said proceedings, an order was made and entered by the court authorizing plaintiffs to institute a suit against Morris and Sax & Zekind to recover such interest in the property so claimed by them; the said defendants being by said order restrained from disposing of any of the property until that action had been prosecuted to judgment, or until otherwise ordered.

This suit was then commenced. The complaint, after reciting the commencement of each of said actions, the levying of the writs of attachment in the manner hereinbefore stated, the issuance and return wholly unsatisfied of each of the executions, and the supplementary proceedings in one of the actions, further alleges that the assignment was fraudulent and fictitious, and was made for the purpose and with the intent of hindering, delaying, and defrauding the plaintiffs and other creditors of the assignor; that the assets in the possession of the assignee were insufficient to pay the preferred claims; that the assignor at the time of the making of the assignment was the owner of a stock of goods in Helena worth many thousands of dollars, which she did not turn over to the assignee, but which she fraudulently claimed to have sold to defendants Sax & Zekind before the assignment was made, and that such transfer was made without any consideration, for the purpose and with the intent of hindering, delaying, and defrauding plaintiffs and others of her creditors; that the assignor retained in her possession and under her control other property which was not by law exempt from execution, for the purpose of gaining a benefit for herself, and with the intent to hinder, delay, and defraud the plaintiffs and other creditors of hers; that the alleged indebtedness of the assignor to her daughter, Annie Harris, and her daughter-in-law, Sarah S. Harris, preferred

under the assignment, was pretended and fictitious, and was inserted in the assignment for the purpose of consuming the proceeds of said property; that the assignor retained in her possession a large sum of money for the purpose and with the intent of hindering, delaying, and defrauding her creditors and that the assignor purchased from the plaintiffs and other persons large quantities of goods, worth many thousands of dollars, without any intention of paying for them. Plaintiffs prayed that the assignment be declared fraudulent and void as to them; that the defendants, Sax & Zekind and Moses Morris, be required to account for all the property that had been received by them from the assignor, and that all of the defendants be restrained by injunction from interfering with said property; and that the plaintiffs' judgment be satisfied out of said property.

The answers deny all the material allegations of the complaint, except those reciting the institution of the several suits, the levying of the writs of attachment by the garnishments, the issuance and return of the executions, and the supplementary proceedings. In the separate answer of defendants Sax & Zekind it is alleged that Salina Sax advanced and loaned to the assignor, her mother, at different times, in various amounts, the total sum of $11,800, for which the assignor agreed to pay and did pay $150 per month; that a few months prior to the assignment the assignor sold to Mrs. Sax the stock of merchandise at No. 19 North Main street, and credited the amount of her advances upon the purchase price of the stock; that the assignor's indebtedness to Salina Sax was thus fully settled by the sale, made in good faith; and that Salina Sax thereafter failed to assert any further claim against the assignor, or any right to participate in the assigned estate.

The case was twice tried in the district court. The first trial resulted in a disagreement and discharge of the jury. When counsel for plaintiffs opened the case upon the second trial, they stated that, as there were sufficient funds in the hands of the assignee to pay the plaintiffs' judgments, they would

not ask any decree as against defendants Sax & Zekind, or as to the property in their possession which had been garnished, though they did not abandon any of the issues raised by the pleadings as to the fraudulent or fictitious character of the alleged sale by the assignor to those defendants. The defendants objected to the introduction of any evidence, on the ground that the complaint did not state facts sufficient to constitute a cause of action; and, upon this objection being overruled by the court, they excepted. During the trial the defendants reserved exceptions to the rulings of the court in admitting certain of plaintiffs' proofs, in overruling defendants' motion to strike certain of plaintiffs' evidence, in denying defendants' requests for instructions to the jury, and in giving the instructions which were given. The jury made special findings, all of which were adopted by the court, except one, which was set aside, and a new finding made by the court in lieu thereof. The court also made other special findings, which need not be noted here, as they will be set out in the opinion.

As conclusions of law, the court found: (1) "That the assignment alleged to have been made by the defendant B. Harris to the defendant Moses Morris is void; the same having been made for the purpose of hindering, delaying, and defrauding creditors." (2) "That each of the plaintiffs is entitled to a lien upon the funds in the hands of the defendant Moses Morris, by virtue of the execution by garnishment of the several attachments as hereinabove set forth; that they are each severally entitled to a lien by virtue of the service of garnishment notices upon the defendant Moses Morris upon the executions issued as hereinabove set forth; that each of said plaintiffs are entitled to liens upon said funds in the hands of said defendant Moses Morris by virtue of the filing of the complaint of the plaintiffs, and of the complaints of intervention; that said last liens became operative from the date of the filing of said complaints."

Judgment was accordingly entered for the plaintiffs, and the defendants have appealed from the judgment, and also from an order refusing a new trial.

The judgment and order appealed from were affirmed by an equally divided court in *Wilson* v. *Harris*, 19 Mont. 69, 47 Pac. 1101, a rehearing was granted, and the case has been reargued and submitted for decision by a full bench.

H. G. McIntire and *Thos. C. Bach*, for Appellants.

It is not every transfer of property made by a debtor, even though made without consideration or otherwise fraudulent, that a creditor can assail. So long as such transfer does not deprive the debtor of the means of satisfying his creditor's claims, the creditor has no ground for complaint. Succinctly stated the rule is, no person can complain in equity of the fraudulent practices of another unless he has been injured by such practices. Therefore it becomes incumbent upon a creditor seeking equitable relief, to both allege and prove that the debtor has no property to which recourse can be had except that covered by the alleged fraudulent conveyance. A complaint lacking this essential allegation is not even cured by evidence and it may be objected to at any time. (Wait on Fraud. Con. and Creditors' Bills, Secs. 140, 143, 296; 2 Boone's Pleadings, p. 132, note 4; Freeman on Executions (1st Ed.) Sec. 426; 2 Estee on Pleadings, Sec. 2571; *Massey* v. *Gorton*, 90 Am. Dec. note on p. 298; *Emery* v. *Yount*, 7 Colo. 107; *Harris* v. *Taylor*, 15 Cal. 348; *Castle* v. *Bader*, 23 Cal. 78; *Patterson* v. *Donner*, 48 Cal. 369; *Wagner* v. *Law* (Wash.), 28 Pac. 1113; *Hamilton Brown Shoe Co.* v. *Adams* (Wash.), 32 Pac. 93; *Botcher* v. *Berry*, 6 Mont. 451; *Taylor* v. *Johnson* (Ind.), 15 N. E. 238; *Sell* v. *Bailey* (Ind), 21 N. E. 338; *Kain* v. *Larkin* (N. Y.), 30 N. E. 106; *Platt* v. *Schreyer*, 25 Fed. note on p. 87; *Buckeye Engine Co.* v. *Donau Brewing Co.*, 47 Fed. 6; *Kettel* v. *Augusta T. & G. R. Co.*, 65 Fed. 862-3; *Basset* v. *Orr*, 7 Bissell 301; *Christopher* v. *Christopher* (Md.), 3 Atl. 296-299; *Dunham* v. *Cox*, 10 N. J. Eq. 467; *Noble* v. *Hines*, 72 Ind. 15; *Hogan* v. *Robinson*, 94 Ind. 145; *Clarke* v. *Burt* (Kan.), 42 Pac. 733.) One who comes into a court of equity should be willing to do equity. In this case by their own showing plaintiffs had

either the option of pursuing property worth fully $18,000 which, as they claim, and as the court found, was in the actual possession of this judgment debtor and within the jurisdiction of the court rendering their judgments, which did not exceed in the aggregate one-half of the value of said property, or of pursuing property which had been transferred to the assignee defendant for the purpose of paying unquestioned and *bona fide* debts. It is elementary law that the acts and declarations of an assignor made prior to the making of an assignment and not in contemplation of the same and which do not constitute a part of the *res gestae* are inadmissable to impeach the good faith of the assignment subsequently made. If this action had been brought by a vendor to recover the property which he sold by reason of the alleged fraudulent statements of Ben Harris to the various mercantile agencies these declarations might have been relevant because they would tend to show the representations made for the purpose of defrauding that particular creditor in the purchase of those particular goods; but here the testimony was introduced to show not a fraud in the purchase of these goods, but a fraud in the making of an assignment for the benefit of creditors made several months thereafter. That the court attached some importance to this character of testimony is apparent from the fact that it incorporated the result of the testimony in one of its findings. For the same reason all the testimony concerning the Sax & Zekind Famous Clothing Concern was improperly admitted, and all other transactions prior to the assignment, all of which were objected to. (*Bush* v. *Roberts*, 111 N. Y. 278, S. C. 18 N. E. 732; *Truax* v. *Slater*, 86 N. Y. 632; *Bixby* v. *Corskadon*, 70 Iowa 726; *Staples* v. *Smith*, 48 Me. 470; *Flagler* v. *Schoefel*, 40 Hun. 178; Burrill on Assignments, 6th Ed. p. 442; *Button* v. *Richards*, 70 Wis. 272; *Button* v. *Smith*, 62 Wis. 92; *Wilson* v. *Berg*, 88 Pa. St. 167.)

It is also elementary law that acts and declarations of an assignor made subsequent to the assignment are inadmissable to impeach the assignment in the absence of a conspiracy between the assignor and assignee. *A fortiori* should this rule

be applied to the acts and declarations of a former agent of the assignor—one whose agency as appears by plaintiff's own testimony ceased the day after the assignment. If fraud there was, it was a fraud against the assignment and not in the assignment—the fraud originating after the assignment and not having its existence at the time of the assignment. (Wait on Fraud. Con. Sec. 278; Burrill on Assignments, 6th Ed. Sec. 362 *Kain* v. *Larkin*, 131 N. Y. 300; *Bixby* v. *Carskadon*, 70 Iowa 726; *Wilson* v. *Berg*, 88 Pa. St. 167; *Sullivan* v. *Smith*, 19 N. W. Rep. 620; *Cuyler* v. *McCartney*, 40 N. Y. 223; *Williams* v. *Robins*, 15 Gray 590; *Moag* v. *Farley*, 79 Ala. 246.)

McConnell, Clayberg & Gunn, for Respondents.

Where a party makes a general assignment purporting to convey all of his property, and retains property of a substantial value which he does not deliver under the assignment, it is conclusive evidence of a fraudulent intent in making the assignment. (*Coursey* v. *Morton*, 132 N. Y. 556; *Baum* v. *Pierce*, 7 So. 548; *Aylesworth* v. *Dean*, 12 Pac. 241; Burrill on Assignments, Chap. 19; *Smith* v. *Mitchell*, 12 Mich. 180; *Farrington* v. *Sexton*, 43 Mich. 454; *Merchants' National Bank* v. *Greenhood*, 16 Mont. 395.) It should also be remembered that there was an issue in this case as to the indebtedness of B. Harris to Mrs. Sax. The statements introduced were competent as bearing on this issue. (*Shauer* v. *Aterton*, 151 U. S. 607; *English* v. *Friedman*, 12 So. 252; see also *Josephi* v. *Mady Co.*, 13 Mont. 195.) It cannot be controverted that where a person, a short time prior to making a general assignment, purchases a large amount of property without any intention of paying for same, such conduct constitutes, to say the least, a badge of fraud. (See Bump on Fraudulent Conveyances, 4th Ed. Chap. 12.) The acts, conduct and statements of Ben E. Harris with reference to the Sax & Zekind property while in possession of the same were cleary admissible. (*Garr, Scott & Co.* v. *Shaffer*, 36 N. E. 208; *Rosenberg* v. *Burnstein*, 61 N. W. 684; *Murphy*

v. *Mulgrew*, 102 Cal. 547; *Redfield* v. *Buck*, 95 Am. Dec. 241; *Grant* v. *Lewis*, 14 Wis. 487; *Smith* v. *Boyer*, 26 Am. St. Rep. 373; *McDowell* v. *Goldsmith*, 61 Am. Dec. 305; *Martin* v. *Hardesty*, 62 Am. Dec. 773; *Tyres* v. *Kennedy*, 26 N. E. 394; Bump on Fraudulent Conveyances, 4th Ed. Sec. 600.)

Reply of Appellants: A party is not bound by the answer of his own witness to such an extent that he cannot show by other witnesses a fact to the contrary, but we respectfully submit that when the plaintiffs in this case proved by Ben Harris that he ceased to be the agent of Mrs. Harris the day after the assignment, that that fact is a fact in this case until somewhere in the record the contrary appears. Neither directly nor indirectly does it appear in this case that Ben Harris was his mother's agent at any time succeeding the day after the assignment, so that even upon this proposition alone we submit that the acts and declarations of Ben Harris after the assignment were improperly admitted in this case. (*Casey* v. *Thieviege*, 19 Mont. 341, 48 Pac. Rep. 397.) The Sax & Zekind property did not belong to Mrs. B. Harris at the date of the assignment whether the disposal was fraudulent or not. When A. disposes of property fraudulently to B., the property is B.'s as against A.; at any rate such property could not be included in a general assignment for the benefit of creditors. A. could not sue B. to regain the property. That proposition is elementary. And a prior fraudulent assignment or transfer does not of itself make a subsequent assignment fraudulent. (See *Estes* v. *Gunter*, 122 U. S. 450; *Crawford* v. *Neal*, 144 U. S. 585; *Deere* v. *Lasy*, 67 N. W. Rep. 462.) All of the testimony referring to the disposal of that property by Moses Morris, by H. L. Frank and by B. Harris, after the assignment, was improperly admitted. Even conceding that Ben Harris was the agent of Mrs. B. Harris, that she was the actual purchaser of the property herself, still that possession was not such a possession as forms the basis for the rule that

the testimony of subsequent acts can be admitted in evidence because the assignor is in possession. The character of the possession which forms the exception to this rule must be a possession under the same title which the assignor had at the time of the assignment. It cannot be a title derived from an honest assignee under or through a sale made by him; otherwise no assignment could remain valid where an assignor after having assigned his property saw fit to purchase some of it at a sale by the assignee. We submit that Mrs. B. Harris had the right to buy from the assignee herself if she saw fit to do so, and that her purchase of the same could not invalidate this assignment. (See *Tilson* v. *Terwilliger*, 56 N. Y. 274; *Coyne* v. *Weaver*, 84 N. Y. 392.) In order to allow the acts or declarations of an assignor in evidence against the assignment they must form a part of the *res gestae*; and that means they must be acts contemporaneous with the assignment and made in contemplation thereof. For a definition of *res gestae* see *Tilson* v. *Terwilliger*, *supra; Crawford* v. *Neal*, *supra; Estes* v. *Gunter*, *supra; Coyne* v. *Weaver*, 84 N. Y. 392; *Flannery* v. *Tassel*, 30 N. E. (N. Y.) 246; *Ford* v. *Williams*, 13 N. Y. 576. Although an error in the admission of evidence in a suit in equity will not ordinarily justify a reversal, yet where it appears from the record that the court below considered the testimony so important that it made the same the basis of a finding of fact, then the appellate court cannot consider that the error was not prejudicial. (*Bush* v. *Roberts*, 111 N. Y. 278.)

PIGOTT, J. Defendants specify 93 errors of law, and 34 particulars in which the evidence is claimed to be insufficient to justify the findings. Many of the questions presented are difficult of solution, and have received from us the painstaking examination and attentive consideration which their importance demands.

1. The first error assigned is the action of the court in overruling defendants' objection to the introduction of any evidence. It is contended that the complaint is fatally defect-

ive because it omits to charge the insolvency of Bathsheba Harris, and her lack of property other than that covered by the alleged fraudulent sale and assignment. We refrain from expressing an opinion as to the sufficiency of the complaint in this respect. If it be defective in the particular mentioned, the answers doubtless supplied the omission, and so cured the defect. (*Crowder* v. *McDonnell* (this day decided by this court), 54 Pac. 43; *Hamilton* v. *Great Falls Railway Co.*, 17 Mont. at page 341, 42 Pac. 860, and 43 Pac. 713; Pomeroy on Remedies, Sec. 579; *Shively* v. *Land and Water Co.* (Cal.) 33 Pac. 848.) This supposed defect in the complaint is the only specific ground presented in this court by defendants' counsel, in their briefs and oral arguments, in support of the objection to the introduction of evidence because of the want of equity in the complaint; but, notwithstanding this seeming waiver of any other defect in the complaint, we feel that the court cannot regard the silence of counsel as a restriction upon the legal scope of their general objection. If plaintiffs had a plain, adequate and complete remedy at law, a court of equity should refuse to take jurisdiction; and, indeed, it would be without jurisdiction, for equity may act in those matters only in which no remedy is afforded in the ordinary course of law, or in which the remedy at law is deficient. The court must therefore in every suit brought to invoke the aid of its chancery powers, determine *in limine* the question whether or not it has jurisdiction; and hence we must decide whether for any reason the complaint fails to state facts sufficient to constitute a cause of action.

When Bathsheba Harris made the assignment, plaintiffs were general creditors of the assignor. They had no lien upon or charge against any of her property; nor did they have an interest under any trust, declared or created, in any way touching the property. Plaintiffs allege, however, that their debtor fraudulently, and for the purpose of hindering, delaying and defrauding them, transferred and delivered to the assignee a portion of her property in trust for the benefit, practically, of some only of her creditors, and attempted to screen

the remainder of her assets by various contrivances, the boldest of which was a fictitious or colorable sale to her daughter of a large and valuable stock of goods, which was delivered to the pretended purchaser a few months before the assignment, and was in her possession at the date thereof. Plaintiffs further state that almost immediately after the assignment they commenced actions against the assignor in the district court, and after the issuance of summons caused a writ of attachment to be issued in each action, which writs were executed by the sheriff through a levy by garnishment on all the effects in the possession of the assignee, and all in the possession of the pretended purchaser; that a judgment was subsequently entered in each of the actions in favor of plaintiffs and against the assignor, and that an execution issued thereon, and was returned as wholly unsatisfied; that thereafter, in one of the actions, proceedings supplemental to the execution were instituted, which resulted in an order of the court directing plaintiffs to bring an action to determine the interests of defendants in the property sought to be reached.

Are these allegations sufficient to entitle plaintiffs to the aid of a court of equity to investigate the proceedings whereby the debtor attempted to dispose of her property? If true, would they warrant such a court in enforcing the application of that property to the payment of plaintiffs' judgment? As all the property involved is personalty, it is manifest that no lien thereon resulted from either the judgments obtained by plaintiffs, or the executions issued and returned unsatisfied. If, therefore, we should decide that it was necessary for plaintiffs to obtain a lien of some sort upon the property, as a prerequisite to a resort to equity for the enforcement of their supposed rights, we must look for that lien as the result of the levying of the attachments issued in plaintiffs' actions against the assignor, since there are no other proceedings shown by the record whereby any such rights were secured, or attempted to be secured, for plaintiffs.

Did plaintiffs, by the attachment levies set out in the complaint, secure a lien upon any of their debtor's property? The

method of executing a writ of attachment was provided by Section 186 of the Code of Civil Procedure (Compiled Statutes of 1887), then in force.

The subdivisions of that section applicable to these supposed levies are as follows: "Third. Personal property capable of manual delivery shall be attached by taking it into custody." "Fifth. Debts and credits, and other personal property not capable of manual delivery, shall be attached by leaving with the person owing such debts, or having in his possession, or under his control, such credits and other personal property, or with his agent, a copy of the writ, and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession, or under his control, belonging to the defendant, are attached in pursuance of such writ."

"Property," in its appropriate sense, denotes the interest one may have in lands or chattels to the exclusion of others (*Ayers* v. *Lawrence*, 59 N. Y. at page 198; *Chicago & W. I. R. Co.* v. *Englewood R. R. Co.*, 115 Ill. at page 385, 4 N. E. 246; *Denver* v. *Brayer*, 7 Colo. 113, 2 Pac. 6), although the word is frequently employed to indicate the subject of the property, rather than the property itself. (19 Am. and Eng. Ency. Law, 284.) A chattel may be the subject of distinct properties held by several persons. One may have the right to possession or use, or both, while another holds the legal title to the corporeal thing, subject to the interest of the possessor. The one has the special, and the other the general, ownership. The one has the right to the chattel, and the other an interest in it. The right or interest of each is his personal property. Where one person is possessed and entitled to possession of a chattel which is owned by the debtor, or in which he has an interest, the "personal property" subject to attachment as that of the debtor is the interest of the debtor in the chattel, and is not the *res* itself. The chattel so owned may be, and usually is, capable of manual delivery, but the present possession and right thereto are not in the debtor. In such case the interest of the debtor in the chattel existing *in*

præsenti, but to be enjoyed *in futuro* as a right to it, is not capable of manual delivery; nor is the chattel itself, the seizure of which cannot be made without invading and disregarding the right of the possessor, so capable, within the meaning of the statute. That this must, in the nature of things, be true of such property, and that garnishment is the mode of attaching it, seems evident. But where the present right to the chattel, as well as the ownership of it, is in the debtor, then, at least, the personal property—the chattel—is capable of manual delivery, unless physical conditions prevent—as, for example, in the case of a growing crop. (*Raventas* v. *Green*, 57 Cal. 254.) In subdivisions 3 and 5 of section 186 a clear distinction is drawn between the method of attaching personal property capable of manual delivery, and that to be pursued in attaching debts, credits, and other personal property incapable, for any reason, of manual delivery; and the distinction seems to be recognized in *Brownell* v. *McCormick*, 7 Mont. 12, 14 Pac. 651, where the court say: "Where property which is sought to be attached, belonging wholly to the debtor, is in the lawful possession of another, proceedings must be had by service upon such other person of a copy of the writ, and the notice required in Section 186, Div. 1, Revised Statutes of 1879 (Section 188, Compiled Statutes of 1887)—in other words, by garnishment."

It is nowhere claimed that any of the property sought to be levied upon in the case at bar was attached by actual seizure, or by "taking it into custody;" nor does it appear, even inferentially, that any of the property was not capable of manual delivery. Hence, as to "personal property capable of manual delivery," we must assume that the sheriff proceeded under the provisions of the fifth subdivision above quoted, which indicates the mode of levying upon "debts, credits and other personal property not capable of manual delivery." We are not now considering a case wherein it appears or is claimed that the property of the debtor is, as to plaintiffs, in the rightful possession or under the rightful control of a third person. Plaintiffs allege, in substance, that the "personal property ca-

pable of manual delivery," which was in the possession of the assignee, was delivered to and held by him under a conveyance which was a fraudulent and void attempt to cheat plaintiffs and other creditors of the assignor, and that the sale of property claimed by, and to be in the possession of, Sax & Zekind, was a mere pretended and colorable sale, under which the full ownership and possession remained in the assignor, and that such pretended sale to Sax & Zekind was a mere contrivance to deceive and defraud the creditors of the real owner and possessor.

Assuming the averments of the complaint with reference to the property and the character of defendants' possession of it to be true, we cannot doubt plaintiffs' right to require the sheriff to execute the writ upon the property by an actual seizure of the chattels themselves; that is to say, by taking them "into custody," as provided by statute. Confronting us, therefore, is the serious question whether the garnishment proceedings created any new right in plaintiffs concerning the specific personal property sought to be affected, for the enforcing whereof they may successfully invoke the aid of equity. The precise question is one of first impression in this court. In *Merchants' National Bank* v. *Greenhood*, 16 Mont. 397, 41 Pac. 251, the allegations of the complaint with reference to the attachment were "that on the 15th day of February, 1892, the sheriff, by virtue of the power and authority vested in him as such officer, and under and by virtue of said writ of attachment, did levy upon and seize and take into his possession that certain stock of goods, wares and merchandise situate and being in that certain store building on South Main street, in the city of Helena, known and designated as 'No. 24,' and by garnishment levied said attachment upon all the money and other property and effects of said Greenhood, Bohm & Co. in the hands of the defendant Max Kahn, assignee." It is therefore apparent that, whatever application of the principles announced in that case may be made to the one now before us, there existed a feature in that controversy distinguishing it from that at bar, unless the garnishments

herein referred to accomplished the same result and produced the same legal status as the attachment by actual seizure shown in the Greenhood case. In *Montana Nat. Bank* v. *Merchants' Nat. Bank*, 19 Mont. 589, 49 Pac. 50, the learned justice, in delivering the opinion of the court, used the following language: "As to a chattel capable of manual delivery, in the possession of a garnishee, we cannot agree with appellants that no lien results from the garnishment. An inchoate lien or right is acquired by garnishment as to such chattels. In this case, however, a debt was garnished, and just what right in connection with the property of the garnishee was acquired by virtue of the garnishment is a question of difficulty." From the statement just quoted, that "in this case, however, a debt was garnished," it is clear that the remarks with reference to the effect of a garnishment upon chattels in possession of the garnishee were made with reference to a point not involved in the controversy then under consideration, and were wholly unnecessary to the complete determination of the rights of the parties concerned. We take occasion to observe, also, that an examination of the facts in the case last cited, and of those cited in support of the dictum of the able justice, discloses that the garnishee had rightful possession of the "debts, credits and other personal property," and that no question was raised touching the effect of a garnishment upon property in possession of persons asserting ownership under attempts, fraudulent and void as to creditors, to unlawfully conceal or improperly dispose of the debtor's assets. In each of the Nebraska cases referred to by Mr. Justice Buck in that case, the garnishee was a chattel mortgagee, rightfully in possession under the mortgage, and the assets sought to be reached by the garnishment were such of the mortgaged goods belonging to the debtor as might not be required for the satisfaction of the prior claim of the mortgagee in possession. While, therefore, it is unnecessary to criticise or question the reasoning of the opinion or the result reached in that case, we do not recognize it as deciding that a lien is acquired by service of garnishment upon one who is fraudulently in the open possession

of chattels belonging to the debtor, and whom the debtor has put into possession for the purpose of concealing assets properly applicable to the claims of the debtor's general creditors. The manifest policy of our law is to extend to chattel property as much freedom of transfer as is consistent with a reasonable regard for the rights of those who, from the necessities incident to commercial business, trust to the character and good faith of customers, and fail to require and obtain other security for their obligations. Creation of liens upon such property by mortgage, by pledge, and to some extent by contract reserving title or interest even after delivery, is permitted, but in all cases our laws demand the strictest adherence to whatever statutory conditions are imposed upon the favored few who claim the benefit of the privileges thus sought to be conferred, and whenever, under any circumstances, a statutory lien upon personal property is asserted, the burden of showing full compliance with the statutory provisions is upon those who profess to have restricted for their own benefit the facility for free transfer which the common law recognizes and seeks to encourage.

Under the old system, still in vogue in many eastern and southern states, a writ of execution becomes a lien upon the debtor's chattels at the moment it is placed in the officer's hands for levy; while in Montana, and generally in the younger western communities, an actual levy is an indispensable prerequisite to obtaining a lien by such process. "All liens by attachment shall accrue at the time the property of the defendant shall be attached by the officer charged with the execution of the writs, in the order in which they are levied." (Section 204, Code of Civil Procedure, Compiled Statutes of 1887.) All property may be levied upon under an execution in like manner as upon writs of attachment, and until such levy property is not affected by the execution. (Section 319; Code of Civil Procedure, Compiled Statutes of 1887.) When, therefore, a creditor, who "at the time of issuing the summons, or at any time afterwards," seeks to "have the property of the defendant not exempted from execution attached

as security,'' he must pursue the statutory method, or else fail in his attempt to secure an advantage which the law permits, but which it confers upon those only who are careful as well as diligent; or, in the language of Mr. Justice Harwood, when speaking of a chattel mortgagee who had not complied with the statutes: ''If one attempting to create a special lien in his favor, or to take advantage of one provided by law, fails to comply with the provisions of the law governing, then such creditor falls back in the common line occupied by other general creditors, and cannot invoke the rules or doctrines of equity to avoid this result.'' (*Milburn Manufacturing Co.* v. *Johnson*, 9 Mont. 541, 24 Pac. 18.)

If the general creditor seeks to obtain security by attachment, the statute would seem to afford a clear guide as to the method of procedure to accomplish that end. If he seeks a lien upon real estate, the steps to be taken are clearly indicated; if he seeks a lien upon shares of the capital stock of a corporation, the law leaves no doubt as to the *modus operandi;* if he seeks a lien upon ''personal property capable of manual delivery,'' the statutes require that it ''shall be attached by taking it into custody;'' if he seeks to attach 'debts, credits and other personal property not capable of manual delivery,'' the proceeding usually known as ''garnishment'' is indicated; and if he possesses any information as to debts owing by third persons to the debtor, or as to such property of the debtor in their custody, section 188 of the statute advises him that by imparting this information in writing to the sheriff he will secure the appropriate process for that purpose. If the general creditor seeks to attach property in the possession of a person other than the debtor, and is in doubt as to the ownership or right to possession of the property, section 190 provides for the examination under oath of such person respecting the matter, and also for like examination of the debtor ''for the purpose of giving information respecting his property,'' and ''the court or judge may, after such examination, order the personal property capable of manual delivery to be delivered to the sheriff,'' whose duty it would then be to at-

tach the property by taking it into custody. By section 193 it is provided that if, after any personal property has been attached, it "should be claimed under oath by a third person as his property," the creditor may, if he considers the claim unfounded, furnish a bond of indemnity to the sheriff, and retain the property under attachment.

Did plaintiffs proceed in conformity with these provisions, and did they obtain an attachment lien upon any property of their debtor? When a general creditor, feeling aggrieved by the provisions for preferences in an assignment, indulges in suspicions, well founded or otherwise, as to the good faith of the assigning debtor, an investigation by a court of equity into the entire financial history of the debtor and his business ventures offers a strong temptation to avoid the usual proceedings by attachment of the goods claimed to have been fraudulently disposed of, and their subsequent sale under execution. The usual steps (or those which were customary until quite recently) involved the practical proof of the creditor's confidence in his claim, which is afforded by the indemnifying bond required by the prudent sheriff, or which, without a bond, is evidenced by the actual seizure of the property, under writ of attachment or execution, as that of defendant, with the resulting cause of action to the real owner, should he prove to be other than the debtor; and hence we find that in many cases the extraordinary powers of chancery are invoked for the mere purpose of investigation, in the hope of discovering fraud not then known to exist. The proceeding is not very expensive, involves no very great responsibility or risk, and is not infrequently resorted to when unnecessary. But, as full protection is given neither to the debtor nor preferred creditor, we are not disposed to encourage or facilitate such proceedings, unless the facts disclosed by the pleadings bring the case strictly within the well established principles which determine the creditor's right to resort to equity; and the trial court should always require those seeking the exercise of its equity powers to establish clearly the inadequacy of the remedy at law.

In the case at bar, plaintiffs allege that the property of their

debtor was delivered to, and was in the possession of, a grantee, under a conveyance fraudulent and void as to them. If this be true, we can find no authority in the statute sanctioning a mere notice of garnishment upon such a possessor.

Nothing in section 188 declares the effect of the garnishment therein mentioned upon the debts, credits and other personal property owing or belonging to the debtor, and in the possession or under the control of the garnishee. Its language is: "Upon receiving information in writing from the plaintiff or his attorney, that any person has in his possession, or under his control, any credits or other personal property belonging to the defendant, or is owing any debt to the defendant, the sheriff shall serve upon such person a copy of the writ, and a notice that such credits or other property or debts, as the case may be, are attached in pursuance of such writ."

This section was not designed to, nor does it, provide a mode by which personal property may be attached. It does not enlarge the method of attachment prescribed by section 186. It contains no intimation that "personal property capable of manual delivery" can be attached by garnishment. Section 186 prescribes the several appropriate modes in which the writ shall be executed upon different classes of property, and these modes are exclusive. (*Kiesel* v. *U. P. Ry. Co.* (Utah), 21 Pac. 499.) It declares that the act necessary to an attachment of personal property capable of manual delivery is actual seizure; such property shall be attached by taking it into custody. Section 188 indicates a mere procedure to be adopted by a creditor who would avail himself of the right to secure an attachment under, and upon property of the kind described in, section 186. It relates exclusively to the duty of the sheriff under the circumstances therein recited, and hence, if its language refers in uncertain terms to conditions which have been specifically described and declared in the prior section, we must look to those prior provisions for the explanation of any doubtful language in section 188, rather than regard these incidental references as modifications of the distinct declara-

tions of the earlier section. Section 188 is not intended as a legislative enactment as to when an attachment may be issued or levied, upon what it may be levied, or how it is to be levied upon any class or kind of property. These subjects will be found fully acted upon elsewhere. This section merely makes it the duty of the sheriff to levy by garnishment when notified in writing that property subject to garnishment is within the reach of that process, as provided by the prior section; and hence, keeping in view this purpose of section 188, it seems quite clear that its somewhat loose language cannot operate to enlarge the scope of its action, and convert it into an amendment of the previous provisions. On the contrary, it should be held to mean that which is in harmony with the clearly defined limits of the process and property to which it refers, as determined by those earlier provisions which profess to specifically treat of that subject. Applying these reasonable rules of construction we find that section 188 can operate only when the sheriff receives written notice "that any person has in his possession or under his control, any credits or other" garnishable "personal property belonging to the defendant."

It is claimed that the provisions of section 190 throw light upon the meaning of section 188, and warrant a construction by which personal property capable of manual delivery may be attached by garnishment. But here, again, in making such contention, the subject and the object of the section are overlooked. Section 190 contemplates a condition requiring investigation as to the status of property in the possession of third persons, and supposed to belong to the debtor; and it requires, consistently with the provisions of section 186, that, if any such property is found to belong to the debtor, the court may "order personal property capable of manual delivery to be delivered to the sheriff upon such terms as may be just, having reference to any liens thereon or claims against the same," whereas, as to "all other personal property," it requires only "a memorandum to be given * * * containing the amount and description thereof." Thus, the distinction is preserved, and the operation of section 190 results in

an actual seizure by the sheriff, under the direction of the court or judge, of all personal property capable of manual delivery, but in a mere garnishment as to that which is not capable of such delivery. If at liberty to examine all the provisions found in later sections in order to determine the meaning of the plain language of section 186, we may inquire how the sheriff is to sell, under section 192, and as upon execution, personal property capable of manual delivery, supposed to be attached by garnishment; how he is to deliver to a third party claimant, under section 193, personal property capable of manual delivery so attached; and how he is to satisfy the judgment out of garnished personalty under section 194. But each of these sections will be found in perfect accord, the one with the other, and all with the earlier provisions, if each be confined to the sphere of its proper operation as plainly indicated by the purpose sought to be provided for or accomplished by each enactment; and no conflict, or even uncertainty, will arise unless some section is so construed as to make it affect conditions fully covered by other sections, and entirely foreign to the subject treated by its special provisions. The personal property belonging to the defendant, but in the possession or under the control of another, which the plaintiff must attach by garnishment, is the personal property described in the fifth subdivision of section 186 as "not capable of manual delivery." Respondents say that these sections were taken from the practice act of California, and have been the law of that state since 1851 up to the present time. In this they are correct. They suggest that if any doubt existed in respect of the interpretation of the expression "other personal property," used in section 188, some adjudication of the question would be found by the courts of California, where for nearly 50 years the section has been in force; and they cite several cases in which, as they claim, it appears that chattels capable of manual delivery have been attached by garnishing the possessor. (*Dunsmoor* v. *Furstenfeldt*, 88 Cal. 522, 26 Pac. 518, is cited. There the clerk of a court had been ordered to pay to a creditor of an insolvent a certain sum of

of money; and the court held the creditor did not thereby become entitled to, nor did he own, any particular or specific money, but that the clerk was a debtor to him, and garnishment of the clerk as a debtor of such person was upheld. In *Chandler* v. *Booth*, 11 Cal. 342, it seems that the garnishee collected the state controller's warrant for $1,600, which had been delivered to him by the debtor, and out of which the garnishee was to pay certain claims owing by the debtor; and the debt was attached by garnishment. In *Roberts* v. *Landecker*, 9 Cal. 262, the opinion does not contain any intimation as to whether or not the property attached was capable of manual delivery, nor was the question presented. *Raventes* v. *Green*, 57 Cal. 254, is to the effect that a growing crop in the possession of and owned by the debtor is personal property not capable of manual delivery, and is therefore to be attached by process of garnishment served upon him. But the supreme court of that state has considered the question, and decided it. Montana adopted these statutes from California in 1864, and as early as 1856, in *Johnson* v. *Gorham*, 6 Cal. 195, it was held that "the service of a copy of execution and notice of garnishment upon a third person constitutes no lien upon property of the debtor in his hands, capable of manual delivery." Then, as now, property could be subjected to levy on execution only in the manner provided for its attachment. Recognition of this doctrine is found in Freeman on Executions, Section 159, and in Shinn on Attachments, Section 467.

If the assignment was made in good faith, and is free from defects, plaintiffs have no rights at all in or to the assigned property, except to participate in the distribution of the proceeds after liquidation of preferred claims; but if, as alleged, the assignment was a mere contrivance to defraud them, it is void as to them, the property attempted to be transferred by it was still owned by the debtor, the possession of the assignee was without right as to them, and the goods were subject to attachment to the same extent, and in the same way, and only in the same way, as if the assignment had not been made. It is alleged that the assignee was in the possession of

the assigned goods at the time of the attachments, and it does not even appear that they had been converted into money. Assuming the truth of all the allegations of the complaint, we feel compelled to hold that plaintiffs did not, so far as appears, obtain through the garnishments a lien upon any of the property in the hands of the assignee.

Whether a specific lien upon personal property of the debtor, not capable of manual delivery, and in the possession of the garnishee, or upon its proceeds, is created by virtue of the garnishment, is not a question before us, and will not be considered. Among the authorities relating to that question are the following: *McConnell* v. *Denham*, 72 Iowa 494, 34 N. W. 298; *McGary* v. *St. Louis Coal Co.*, 93 Mo. 237, 3 Am. St. Rep. 522, 6 S. W. 81; *Gregg* v. *Savage*, 51 Ill. App. 281; *Lawrence* v. *Bank*, 35 N. Y. 320; Shinn on Attachments, Section 467; Drake on Attachments, Section 453; Wade on Attachments, Section 355. In *Barter* v. *Spencer* (Okl.) 41 Pac. 605, and *Hulley* v. *Chedic* (Nev.) 36 Pac. 783, are collated a number of the leading cases upon this question.

Plaintiffs, in their brief filed by request of court since the submission of the appeal, advance the argument that the allegations of the complaint are sufficient for the matter now under consideration, because it avers that "under and by virtue of said writ of attachment, so issued as aforesaid the said sheriff attached all moneys, goods, effects, debts due or owing, and other personal property belonging, to the defendant B. Harris, in the possession of and under the control of the defendant Morris, by delivering to him a copy of said writ, with a notice in writing that such credits, property and debts were attached in pursuance of said writ." The legal significance of this language is that defendant Morris was served with garnishment; that and nothing more. It states that any moneys, goods, effects and debts in the possession of Morris, were attached by garnishment, but it fails utterly to allege that he had any such effects subject to garnishment at the time it was served. He who prays the interposition of equity in a case like this must show distinctly all the facts which entitle him to its aid.

Plaintiff's abandonment of all claim to the property which was claimed to have been sold to Sax & Zekind makes it unnecessary to consider the effect of the garnishment served, or attempted to be served, upon them.

Having reached the conclusion that a mere garnishment of the assignee did not create a lien upon the chattels in his possession, we shall next inquire whether such a lien is necessary in order to entitle plaintiffs to maintain the present suit. It is to be observed that this is not a bill for the discovery of equitable or other assets fraudulently secreted or concealed, and beyond the reach of execution. It must be remembered that there is no insolvency law in Montana, and that debtors may lawfully use their property for the payment of some creditors to the exclusion of others. This preference may be accomplished by mortgages securing some, without giving similar or any security to others; it may be accomplished by an actual delivery of a portion of the property in payment of some existing obligations, without similar provision for others; or it may be accomplished by a complete transfer of all the debtor's assets in trust to be converted into cash, and the proceeds applied towards the payment of his liabilities in the order provided in the instrument creating the trust. Unless done with fraudulent purpose, this may be lawfully done; even under circumstances indicating gross ingratitude to the unpreferred creditors, and the most inexcusable moral injustice in the distribution of the common fund from which all might reasonably expect to receive an equal pro rata payment. Whatever, therefore, may be the rights of creditors in other jurisdictions, in this state they have no right to interfere with or complain of their debtor's disposition of his property, so long as that disposition is untainted with the intent to hinder, delay or defraud them. If the debtor does make a disposition of his assets for the purpose of hindering, delaying, or defrauding his creditors, the act is void and of no effect as to them; and they may disregard the transfer, and pursue the same course in the enforcement of their claims as if such attempt had not been made. In many cases, however,—notably

and especially when the assets consist in whole or in part of real property,—it has been found that the attempted fraudulent disposition of assets by the debtor created a cloud upon the property sought to be reached, as well as upon the legal proceedings whereby the creditor was attempting to enforce his claim, and operated as an obstruction to the execution of the process through which the sale of the debtor's property was to be made. As such proceedings at law are taken in disregard of the alleged fraudulent and void transfer, but do not involve any adjudication of the invalidity of the transfer, purchasers at such sales have manifested a natural hesitancy in bidding for property supposed to be still involved in litigation; and hence these ordinary proceedings at law have frequently been considered inadequate for the attainment of the purposes rightfully sought to be accomplished through their agency. Courts of equity have, therefore, from very early times, entertained applications by creditors for the full relief which courts of law have been and are powerless to afford through the operation of their limited process. Such proceedings, then, involve no new encroachments by courts of equity upon the domain of law, nor do they call for the application of any new principles of equity jurisdiction. Inadequacy of the remedy afforded by courts of law constitutes the very cradle of chancery, and it might even more appropriately be called the parent of all power possessed by courts of equity; so that the recognition of the remediless rights of creditors is in harmony with the fundamental principles of proceedings in equity, and, if confined to cases necessarily requiring equitable aid, furnishes no ground for alarm even to the most ardent advocate of trial by jury. But while chancellors have ever lent a willing ear to the appeals of creditors, and have not evinced timidity in affording the requisite relief when warranted by the circumstances set forth in the bill, yet the extraordinary and peculiar powers of equity cannot be successfully invoked by those who have failed to first avail of whatever procedure the law affords for the establishment of their claims, and for the acquisition of a lien upon, interest in, or

right concerning some specific property. For ordinary contests in respect of disputed claims of creditors a court of equity is not the proper forum.

One of the usual prerequisites to obtaining relief in equity is the definite ascertainment, by judicial action, that the creditor is entitled to the claim which he asserts against the debtor. When the claim has reached the condition of an adjudicated and determined demand, and assumed the form of a judgment against the debtor, the creditor cannot even then always find relief in equity. Usually he will be required to prove that his judgment cannot be enforced and satisfied by the processes of the court that rendered it; and this proof is ordinarily, though not always, made by the return of the sheriff on the writ of execution showing that he cannot find property of defendant subject to execution, and that the judgment remains unsatisfied. If the creditor asserts by his complaint that he has a judgment, and proves by the return of the execution unsatisfied, or alleges and proves, that the circumstances are such as to make the issuance of an execution an idle ceremony, he has thereby satisfied two of the chief requirements of equity, and to that extent has laid the foundation for equitable interposition; and if the property sought to be reached is real estate, and the judgment has been docketed so as to impose the judgment as a lien upon that property, he will usually obtain the aid he asks; but, if the property sought to be reached is personalty, he must assert and disclose some lien upon, some specific interest in, or some definite beneficial right concerning the particular property. An adjudicated claim must first be shown by the creditor; he must next show that he has pursued and exhausted his remedy at law, or that under the circumstances he had none to exhaust; and he must also show, in all cases like the one at bar, that he has some lien upon specific property, or some specific and definite rights in respect of it. The doctrine governing this class of equitable remedies is well stated by Mr. Bump in Section 535 of his Treatise on Fraudulent Conveyances. His statement of the rule is supported by the numerous authorities cited in the

note. He says: "A fraudulent transfer is valid against all persons except those who proceed to appropriate the property by due course of law to the satisfaction of the grantor's debts. As it is valid against a simple contract creditor, such creditor cannot ask the aid of a court of equity to set aside the transfer, for it does not interfere with his rights. Equity has jurisdiction of fraud, but it does not collect debts. A creditor must establish his demand at law, and obtain a lien upon the property, before the transfer interferes with his rights, or he has any title to claim relief in equity. No creditor can be said to be delayed, hindered, or defrauded by any conveyance until some property out of which he has a specific right to be satisfied is withdrawn from his reach by a fraudulent conveyance."

The relation sustained by the creditor to his debtor's personalty has been clearly explained in *Tolbert* v. *Horton*, (Minn.) 18 N. W. 648, where the Supreme Court of Minnesota had before it a case involving an attempt to avoid a chattel mortgage as fraudulent. In the course of its opinion the court say: "As a creditor merely, without having availed himself of any legal remedy to apply the property to the satisfaction of the debt, the defendant could not interfere with or disturb the transfer of property affected by the plaintiff's mortgage. The fact that the defendant was a creditor gave him no property in nor lien upon the goods of his debtor. Only by legal process could he, as a creditor, appropriate the property to himself, or subject it to be applied to the satisfaction of his demand. Neither did the assumed conveyance of the property by the debtor, whether made for the purpose of security or of payment, place the defendant in a position to avail himself of the right, as a creditor, to assail the prior conveyance as being made in fraud of creditors, and thus to defeat the title of the prior mortgagee. * * * The object and effect of statutes avoiding fraudulent conveyances of property as to creditors is not to transfer any right of property, nor to dispense with legal remedies for the satisfaction of debts, but to remove obstacles fraudulently interposed to the

enforcing of such remedies, and to enable the creditor to avail himself of these remedies notwithstanding the fraud."

The doctrine requiring the creditor to exhaust his legal remedies, and also to secure some special interest in or lien upon the debtor's property, is so well and universally sustained that authorities would seem unnecessary in its support. More than 30 years ago the Supreme Court of the United States, in *Jones* v. *Green*, 1 Wall. 330, announced this doctrine as familiar and established. The court, through Mr. Justice Field, say: "The objection that the complainants have not shown any attempt to enforce their remedy at law is fatal to the relief prayed. A court of equity exercises its jurisdiction in favor of a judgment creditor, only when the remedy afforded him at law is ineffectual to reach the property of the debtor, or the enforcement of the legal remedy is obstructed by some incumbrance upon the debtor's property, or some fraudulent transfer of it. * * * In the second case the equitable relief sought rests upon the fact that the execution had issued, and a specific lien had been acquired upon the property of the debtor by its levy, but that the obstruction interposed prevents a sale of the property at a fair valuation. It is to remove the obstruction, and thus enable the creditor to obtain a full price for the property, that the suit is brought."

The sheriff's return in each of plaintiff's actions shows that the judgment is wholly unsatisfied; but, while the authorities seem to sustain the conclusive nature of this return, plaintiffs themselves allege that the debtor had an abundance of assets subject to execution at the time they commenced their actions, and when the present suit was begun, and that they failed to resort to the process provided by law for securing that property, and placing it in the custody of the sheriff, where it would have been subject to execution for the satisfaction of their judgments. It does not appear from the complaint that the debtor's property consisted of assets beyond the reach of the writ, but, for aught is shown, it did consist of tangible property which could have been manually seized and held un

der the writ. If this had been done, and plaintiffs could then have shown that, notwithstanding such proceedings, execution would not afford full relief, and secure a fair price for the property seized, a different case would have been presented for our consideration. "The claim for relief rests upon the fact that the crditor has acquired a specific lien upon the property, and that the obstruction interposed prevents a sale at a fair valuation. The bill is filed to remove the obstruction, in order that the creditor may obtain a full price for the property. He must therefore proceed at law until he obtains such a lien. (Bump on Fraudulent Conveyance, Sec. 547.) This court held in *Mer. Nat'l Bank* v. *Greenhood, supra*, that a creditor who had obtained a lien by attachment, and who had established his claim by judgment, furnished satisfactory evidence that his remedy at law was exhausted when he showed the issuance of execution, and its return to the effect that no property could be found except that which had been already attached. In the later case of *Ryan* v. *Speith*, 18 Mont. 45, 44 Pac. 403, this court held that, whenever a creditor has a trust in his favor, the issuing of an execution, and its return showing the judgment to be unsatisfied, are not necessary prerequisites to equitable interference for the purpose of uncovering, reaching, and having applied to his judgment, property fraudulently disposed of and concealed, concerning which the trust exists; and in the more recent case of *Montana National Bank* v. *Merchants' National Bank, supra*, this court refused to follow the rule adhered to in some jurisdictions, that a lien by attachment does not satisfy the requirements of equity. But in none of these cases has this court departed from the familiar principle of equity jurisdiction to which we have referred. In the Greenhood case there was an attachment lien resultant upon an actual seizure, and, when the defendant claimed that the attachment lien had been waived or abandoned, the court, in recognition of the importance of that lien, reviewed the question with great care and at length, in order to justify its holding that the lien had not been waived. In the Speith case the court, in acknowledgment of this principle,

quoted with approval the following language of the Supreme Court of the United States in *Case* v. *Beauregard*, 101 U. S. 688: "It has been decided that where it appears by the bill that the debtor is insolvent, and that the issuing of an execution would be of no practical utility, the issue of an execution is not a necessary prerequisite to equitable interference. * * * This is certainly true where the creditor has a lien or a trust in his favor. * * * But, without pursuing this subject further, it may be said that whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting legal process or remedies." *Case* v. *Beauregard* was also referred to and relied upon in the Greenhood case. Careful examination will disclose that all of the authorities cited and relied upon by the court in the Greenhood case expressly recognize the principles here announced. In *Tappan* v. *Evans*, 11 N. H. 327, it is said: "The general principle deducible from the authorities applicable to this case is that where property is subject to execution, and a creditor seeks to have a fraudulent conveyance or obstruction to a levy or sale removed, he may file a bill as soon as he has obtained a specific lien upon the property, whether the lien be obtained by attachment, judgment or the issuing of execution." In *Chicago & Alton Bridge Co.* v. *Anglo-American Packing & Provision Co.*, 46 Fed. 588, the court say: "In this case the claim was not only certain, but had back of it a judgment conclusive and binding; and, under the law of the forum where the attachment suit was instituted, the complainant had secured and fixed his lien upon the real estate. In *Robert* v. *Hodges*, 16 N. J. Eq. 304, the court say: "But all the cases proceed upon the principle that the judgment creditor, in order to be entitled to the aid of a court of equity in enforcing his remedy by removing obstructions from his path, must have acquired title to or a lien upon the specific thing against which he seeks to enforce his judgment. * * * Unless he has established his title to or lien upon the property of his debtor, he has no right to interfere with his debtor's disposition of it." Even in *Benham* v. *Ham*, 5

Wash. 128, 31 Pac. 459, the court say: "We feel justified in now deciding that where a lien has been obtained by attachment on the property in controversy, and it appears upon the bill that the debtor is insolvent, and the issuance of an execution would be of no practical utility, the obtaining of a judgment, and the issuance of an execution thereon, is not a necessary prerequisite to equitable interference." After quoting these and other cases as authorities in support of its position, this court said at page 447, 16 Mont., and page 266, 41 Pac., as the result of its comprehensive review, "We are perfectly satisfied that, under modern views of equity jurisprudence, the action will lie to remove a fraudulent obstruction to the reasonable success of plaintiff in realizing upon its attachment lien when it has reduced its claim to judgment, and it appears that the said obstacle to the fairly successful execution of judgment exists."

In their brief filed by request of court, plaintiffs suggest that this suit was authorized under, or as the result of, an order made in proceedings supplemental to execution, and that this fact furnishes a complete answer to all objections as to the sufficiency of the complaint. Following is so much of Section 356, Code of Civil Procedure (Compiled Statutes of 1887), as is pertinent: "If it appear that a person or corporation alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, the court or judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such interest or debt; and the court or judge may, by order, forbid a transfer or other disposition of such interest or debt, until an action can be commenced and prosecuted to judgment." The allegations of the complaint are to the effect that, after the return of the execution in *Wilson Bros.* v. *B. Harris*, proof was made to the court that the defendant Morris had in his possession property of Bathsheba Harris in an amount exceeding $50, and that after an examination of Morris an order

was made authorizing the plaintiffs last named to institute a suit against Morris for the recovery of such interest in the property claimed by him. Section 356 is not intended to dispense with the usual and proper prerequisites to the exercise by courts of equity of their extraordinary powers to grant relief in creditors' suits. Proceedings supplemental to execution are provided for in most, if not all, of the states. The courts have not infrequently spoken of such proceedings as a substitute for the creditors' bill, and some have gone to the length of asserting that the creditors' suit in equity has thereby been abolished. By the greater number of courts, and in the majority of cases, however, this extreme view has not been adopted in its entirety, but is modified to the extent of holding that the supplemental proceedings are designed to provide the only remedy, except in matters where the relief sought is beyond the scope of such proceedings, and that in those cases courts of equity yet retain jurisdiction to entertain the suit by creditors' bill. Express sanction of the latter doctrine is found in *Ryan* v. *Maxey*, 14 Mont. 81, 35 Pac. 515. To say that such proceedings are a substitute for the creditors' bill is misleading as well as incorrect. According to the practice in equity, creditors' bills lay (a) for discovery of assets, (b) to reach property or interests not liable to execution, and (c) to remove fraudulent obstructions standing in the way of execution. The bill might have been maintained for discovery with or without either or both kinds of relief. The bill was often dual in character, being both for discovery and for relief. A reasonable degree of accuracy is attained when we say that the supplemental proceedings have, to a great extent, obviated the necessity of that feature of a creditors' bill which sought a discovery, but that, in so far as the equity suit was and is a bill for relief, the supplemental proceedings cannot be considered as a substitute for it, or as having more than a slight resemblance to it. Careful reading of the statutes of the states which provide for supplemental proceedings leads to the conclusion that the main purpose of such legislation is the discovery of concealed property of the debtor, and that when

the chief design of the statute has been accomplished the relief prescribed differs from, and is not even analogous to, that afforded in equity, and that, where any relief whatever results from those proceedings, it is nearly akin to that afforded at law. In Indiana, however, the statutory proceedings are deemed a complete substitute for the creditors' bill as known to chancery.

Under the statutes of this state the judgment creditor may institute proceedings against the debtor himself whenever the execution has been returned unsatisfied, and this without proof, by affidavit or otherwise, as to the condition of the debtor's property; or he may proceed against the debtor at once after the issuance, and before the return of, the execution, provided only that he satisfy the court or judge that the debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment. If the creditor succeeds in satisfying the court that any person other than the debtor has property belonging to him in an amount exceeding $50, those proceedings may be resorted to after execution issued, irrespective of whether it has been returned. When those proceedings are availed of under any one of the three conditions, there results a judicial inquiry into the financial circumstances of the judgment debtor; the principal, if not the only, purpose being to obtain from the debtor and other witnesses all possible information touching assets theretofore unknown, which ought to be applied towards satisfaction of judgment. Such investigation resulting in the discovery of property of the debtor, or of any sum due to him, the ownership or debt being indisputable, the court "may order any property of the judgment debtor not exempt from execution, in the hands of such debtor or any other person, or debt due to the debtor, to be applied towards the satisfaction of the judgment." When the proceedings result in such discovery and in such order they have manifestly operated merely in aid of execution, and have produced only the same result which the execution could have produced if the property so discovered had become known through any other method of inquiry. When resulting in the

accomplishment of their main design, those proceedings, it would seem clear, operate more nearly as a substitute for an execution than for any suit in equity. If, however, the proceedings do not result in the discovery of assets indisputably belonging to the debtor, but result only in the ascertainment of contested claims of indebtedness or other property, the ownership of which is in dispute, the court or judge is powerless, under the law, to afford any relief whatever; for there is practical unanimity in the holding that the court has no jurisdiction to decide the dispute or to direct the application of the property, and that the only power, under such facts, is found in the provision that the "court or judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such interest or debt; and the court or judge may, by order, forbid a transfer or other disposition of such interest or debt, until an action can be commenced and prosecuted to judgment."

Supplemental proceedings may therefore result in the discovery of assets which, if known, would have been subject to execution, and in their application to the judgment through an order of the court suited to the purpose desired; or they may result in the discovery of supposed assets, the ownership of which is disputed, and therefore not within the power of the court to reach in such proceedings, the title to which can be determined only by an appropriate action thereafter brought. It is clear, therefore, that in respect of chattels capable of manual delivery the only relief afforded the creditor by the proceedings is that which follows from the order directing the application to the judgment of property which, as soon as delivered, could without the order be seized under execution. The only other order of the court which can be fairly deemed to be in the nature of relief is that prohibiting the transfer of property in dispute; for we do not regard the order which the court may make, authorizing the institution of an action to recover the interest, as giving any real relief, unless the judgment creditor could not maintain such an action without such

order. What, then, in the case before us, is the nature of, and the consequences flowing from, the order made in proceedings supplemental to the execution, authorizing the judgment creditor to "institute an action for the recovery of such interest?" Is such an order, even in a limited sense, in the nature of a judgment? Does it adjudicate any right or determine any controversy touching the ownership of property sought to be recovered by the action authorized? Does it affect the legal condition of such property, or charge with a lien "personal property capable of manual delivery?" Is the order so potent that any suit may be maintained and any form of action used by the creditor in respect of the property? These, and similar inquiries which might be suggested, carry their own answer, and seem to demonstrate the uselessness of the order in a case like the one at bar, where the assignor, an execution debtor, could not maintain an action against the assignee to recover property transferred to him by an instrument valid between the parties to it. Possibly (though we do not so intimate) the order in such case may serve as a basis for restraining a disposition of the property until an action can be commenced and prosecuted to judgment. This is the utmost effect that can be reasonably claimed for it under the allegations of the complaint. Such an order would doubtless, in the proper case, confer upon the execution creditor the right (otherwise not his) to bring the appropriate action.

We are of the opinion that it was not necessary for plaintiffs to resort to supplemental proceedings. While they properly sought whatever advantage in the way of discovering assets that might result from recourse to such proceedings, we think the order relied upon was not a prerequisite to the institution and maintenance of an appropriate suit in equity. (2 Freeman on Executions, Section 394; *Ryan* v. *Maxey*, 14 Mont. 81, 35 Pac. 515; *Hulley* v. *Chedic* (Nev.) 36 Pac. 783.) Even had the order possessed any legal vitality, it could but authorize the plaintiffs to bring an action which would be appropriate for the purpose sought to be accomplished, and which would vary according to the assets discov-

ered and sought to be reached. When, therefore, the creditor is thus authorized, unnecessarily or otherwise, to institute the appropriate action to recover property discovered by the supplemental proceedings, the action which he thus institutes must be subject to all the rules of pleading which are applicable to a similar action brought by any other person. We cannot think that the order has the effect of protecting his complaint from assault for want of equity, and we are aware of no principle by which we are required to measure the pleading in such action by rules other than those which are of application to similar actions not preceded by such order. These views are not in conflict with anything decided in *Sweeney* v *Schlessinger*, 18 Mont. 326, 45 Pac. 213. In that case it was held that the order authorizing the creditor to bring an action to reach assets practically not vendible on execution, and also incapable of manual delivery, is no part of the cause of action, and is therefore not required to be alleged in the complaint; the reason given being that such order "is simply a provision to keep certain actions within the control of the court." Whether or not the reason be good, the court evidently entertained the opinion that the effect of the order was merely to enable the execution creditor to bring the appropriate action for the purpose of subjecting the assets to the satisfaction of his judgment. No lien upon or trust concerning the property was imposed or raised by the proceedings in the case at bar, or by the order passed therein. It does not appear that the property was concealed, or that it was incapable of manual delivery. On the contrary, the inference is that the property attempted to be pursued was that sought to be attached by garnishment. When the property became known, or was discovered through the proceedings, the way was open to plaintiffs to subject it to an execution, and thereby obtain such lien as equity demands, in a case like the one at bar, as a condition precedent to the exercise of its jurisdiction. Inquiry as to the validity and effect of an order appointing a receiver is not pertinent, as none was passed. Whatever may be the effect (if any) of supplemental proceedings, and of the

order therein made authorizing an action, upon assets beyond the reach of execution, and upon property incapable of manual delivery, we think they do not impose a lien upon chattels capable of such delivery, and open to the writ. The general principle is recognized by the Supreme Court of Iowa in *Reardon* v. *Henry*, 47 N. W. 1022: "Proceedings auxiliary to execution as provided in the statute are extraordinary, and are only to be resorted to when the ordinary processes of the law are not adequate. The purpose of that proceeding is rather for the discovery of property than for applying that which is already known. When the property is known, or by proceedings auxiliary to execution is discovered, the judgment creditor does not need the further aid of this statute, but may subject the property to the payment of his judgment by the levy of an execution. It does not appear that there was any concealment of this property, nor any question as to its identity, but only a question of whether it belonged to this plaintiff or his wife. We see no reason why this judgment creditor might not have levied upon the property as the property of Thomas Reardon, without any order that it be turned over. True, he might thereby have incurred litigation with Mrs. Reardon, but no more so than by this proceeding. * * *" Section 356 seems to have been modeled somewhat upon the statute of New York treating of the same matter; but it is to be observed that the statute of New York differs greatly from ours, and the divergence serves to illustrate in some degree the inutility—at least, in so far as a lien on personal property capable of manual delivery is concerned—of the provision of section 356 for an order authorizing an action. In New York "such interest or debt shall be recoverable only in an action against such person or corporation by the receiver; but the judge may, by order, forbid a transfer or other disposition of such property or interest until a sufficient opportunity be given to the receiver to commence the action and to prosecute the same to judgment and execution;" and the receiver in such cases shall be vested with the property and effects of the debtor as soon as the order appointing him is recorded.

We are therefore of the opinion that the complaint does not state facts sufficient to constitute a cause of action; but we think plaintiffs should be afforded opportunity to amend their pleading as they may be advised; and hence it seems necessary to consider the evidence, the findings, and the errors specified.

2. The contention of plaintiffs as to the facts and the findings have been accurately condensed by the following statement, which we quote from one of their briefs: "The findings of the court, briefly summarized, are as follows: That Ben E. Harris was the general agent of B. Harris, and that all of his acts and transactions and doings concerning her business were approved by her without question; that this agency did not cease at the date of the assignment, but continued as long as the business of B. Harris was conducted by him, and the final disposition of the stock of merchandise in Chicago in the fall of 1893; that the establishment of the alleged firm of Sax & Zekind was a device to cover up a portion of the assets of B. Harris; that the goods contained in the house known as the 'Famous Clothing Company' constituted a part of the assets of B. Harris; that B. Harris conducted business at the Famous Clothing Company's store from the time that said assignment was made until the month of March, 1893; that the remnant of goods, worth about $6,000, were then boxed up by B. Harris, and placed in Curtin's warehouse until the month of July, 1893, when they were removed to her store known as the 'Phoenix,' and afterwards taken with the rest of said stock contained in the Phoenix store to the City of Chicago; that B. Harris was the purchaser of the goods at the assignee's sale, and she opened up a business at No. 119 North Main street on the 26th of April, 1892, doing business in the name of H. L. Frank; that five or six boxes of merchandise were taken from the cellar of the store at No. 119 North Main street, shortly after the assignment, to the cellar of the residence of B. Harris, and fraudulently concealed there; that, shortly after the commencement of business by B. Harris under the name of the 'Cannon Ball,' these boxes of merchan-

dise were removed to the store, and constituted a part of the stock of goods of the defendant B. Harris at that point; that large amounts of merchandise belonging to the defendant B. Harris were stored in the warehouse of the Great Northern and Northern Pacific railroads in the city of Helena some time before the purchase of the stock of goods at the assignee's sale, but were, immediately upon the opening of the Cannon Ball, transferred to that store; that these goods either belonged to the original stock of merchandise owned by B. Harris at the date of the assignment, and were fraudulently withheld, or were purchased with money belonging to the business of B. Harris at the date of the assignment; that the business conducted by B. Harris at the Cannon Ball and at the Famous, and afterwards at the Phœnix, was done with the stock of goods as hereinabove set forth, until the same was removed to Chicago and disposed of in the fall of 1893; that during all of this time B. Harris, through her agent, was in the actual possession of a portion of said goods belonging to her stock of merchandise owned by her at the date of the assignment."

The most radical position taken by plaintiffs is involved in their vigorous attack upon the claim of indebtedness by Bathsheba Harris to Salina Sax, the alleged fictitious sale to Sax & Zekind, and the sale by the assignee to H. L. Frank. These are the salient features of the case, and the *bona fides* of these transactions may be selected as the pivotal points in this long and complicated controversy. The question as to the time when Ben E. Harris' agency ceased, and that as to the concealment of sundry boxes of merchandise, may seem of equal importance; but they will be found dependent, to a great extent, upon the solution of those primary problems upon which plaintiffs practically rest the case.

With respect to the sale by the assignee to H. L. Frank, the court found that "B. Harris, through her agent and general manager, Ben E. Harris, was the purchaser of the goods at the assignee's sale, and she opened up business at the store at 119 Main street, under the name of the 'Cannon Ball,' on April 26, 1892, doing business in the name of H. L. Frank."

We have repeatedly and exhaustively examined the record in the hope of discovering proof to sustain this finding. Search for evidence of any character which tends to sustain the conclusion expressed in this finding has been vain. In the opinion heretofore rendered in this case (19 Mont. 69, 47 Pac. 1101) the justices, while disagreeing as to some questions, referred to this finding in the language following: "While the finding does not so state, it suggests a participation of H. L. Frank in some fraud in the sale by the assignee to him. It is expressly found that the assignee acted in good faith, and we do not think that the facts, as presented to us, warrant any different conclusion as to Frank." We entirely agree in these views. It may be that Frank was merely the nominal purchaser, taking title in his name for the benefit of Ben E. Harris. If this be so, there is no substantial evidence tending to prove that the purchase was made for Bathsheba Harris, or even with her knowledge. The same disposition may be made of the finding that the claim of Annie Harris was fictitious, and inserted in the assignment for the purpose of defrauding creditors. There is no evidence before this court which justifies the finding. The burden of proving that a preference is fraudulent is upon the party so charging, and the mere fact that the relationship of parent and child exists between the assignor and the person holding the demand preferred is not a badge of fraud. Business dealings between near kinsmen are to be treated as are the transactions of other people, and, if the good faith thereof be assailed, fraud must be proved. (*Shultz* v. *Hoagland*, 85 N. Y. 464; *Curry* v. *Lloyd*, 22 Fed. 258; *Estes* v. *Gunter*, 122 U. S. 456, 7 Sup. Ct. 1275; Bump. on Fraudulent Conveyance, Sec. 177.)

The objects of plaintiffs' most vigorous assaults have been the sale by the assignor to Sax & Zekind, and the alleged indebtedness by the assignor to Salina Sax, upon which that transaction was based. Their strenuous efforts to discover and bring to light some supposed fraud in connection with that matter have led to many of the disputes concerning the admissibility of the evidence by which plaintiffs have endeavored

to sustain their theories. Critical examination and full determination of this one matter may serve to eliminate from the case many of the seemingly perplexing questions presented by the reiterated objections of defendants to the competency of plaintiffs' proofs. The court found that "the establishment of the alleged firm of Sax & Zekind was a device to cover up a portion of the assets of B. Harris, and to hinder and delay her creditors; the goods, wares and merchandise left at the house No. Nineteen (19) on Main street, Helena, on or about the 1st day of October, 1891, and known as the 'Famous Clothing Company,' constituted a portion of the assets of B. Harris, and that their inventorial value was $18,000, and they were a portion of the assets of B. Harris at the date of the assignment on the 14th day of December, 1891; that the same were withheld from the assignee for the purpose of hindering, delaying and defrauding the creditors of the said B. Harris; that they were in the actual possession of the said B. Harris, through her general agent and manager, Ben E. Harris, from the time of this pretended sale of goods to Salina Sax, or Sax & Zekind, to the time they were finally disposed of in the city of Chicago." Ben E. Harris, a witness produced by plaintiffs, testified plainly and repeatedly that his sister, Salina Sax, received certain funds as the proceeds of insurance policies upon her husband's life; that out of these funds she sent to him in 1889 and 1890 about $12,000 to be used in the business of her mother in Helena, with the understanding that she should receive for the use of the money $150 each month; that subsequently a branch of the business was opened in Butte, by reason of the funds furnished by her being available for such purpose, and that $150 a month was thereafter paid to her out of the receipts of the branch store so long as it continued in operation; that afterwards the firm of Sax & Zekind was formed, and goods amounting to about $14,000 were sold to that firm, of which sum about $12,000 were paid by the discharge of the debt then owing by Bathsheba Harris to Salina Sax, and the remainder, about $2,000, continued as a charge against the purchasing firm. Every dollar of the alleged re-

mittances by Salina to the agent of Bathsheba was traced by plaintiffs' witness into the business of the assignor, and the indebtedness is abundantly established by competent evidence offered at the instance of plaintiffs themselves. Salina Sax herself testified by deposition, and her evidence corroborates that of Ben E. Harris. Ingenious and plausible argument is the only answer made to this uncontradicted evidence. Presumption of fraud and perjury is not created by the kinship of Bathsheba, Salina and Ben E., nor can we allow the zeal of counsel to overcome the force of the evidence. Actual payment by Salina Sax to Bathsheba Harris of about $12,000 was so clearly proved that counsel do not dispute it. They seek, however, by reasoning resting upon suspicion only, to show that the sums advanced were not loans, but constituted a portion of the assets of the business carried on by Bathsheba Harris. There is neither allegation nor proof that Salina was a partner of her mother; that she had any interest in the business, or control over it; or that she sustained any relation whatever to the enterprise, except that of a creditor; yet we are seriously urged to confirm the finding that the delivery of the goods to Salina Sax by her mother in settlement of a debt resulting from advances admitted to have been made constitutes a mere fraudulent device for concealing assets of the mother. Moreover, during the trial, counsel for plaintiffs said: "I desire to state that, so far as the money that was given by Mrs. Sax is concerned, we do not controvert the fact that it went into the business of B. Harris, and that certain amounts were paid off from the bank in New York." Counsel for defendants then asked: "You don't deny the amount she turned over?" Plaintiffs' counsel responded: "No; it is something like $11,000."

Devotion by an insolvent debtor of all his estate to the payment of certain creditors naturally engenders disappointment in creditors unsecured, and, where one or more relations of the debtor are found in the list of preferred creditors, there is often added to the feeling of disappointment the conclusion that the preference is fraudulent and void; but it is hardly

necessary to say that such a feature of an assignment is as valid, in contemplation of law, as the most meritorious provision for any other class of creditors, and that, while courts will always examine with unusual care and watchful scrutiny the proof by which the good faith of the relatives is sought to be established whenever substantial evidence has been adduced showing fraud, yet it is the duty of courts to exclude from consideration all mere suspicion, and to confine investigation to the evidence exhibited in the record. Suspicion only is insufficient to establish the existence of fraud, which must be clearly and satisfactorily proved. Mere conjecture and surmise, however probable or persuasive, are never permitted to establish fraud. (Wait on Fraudulent Conveyance, Secs. 281, 283; Bump on Fraudulent Conveyance, Sec. 342.) We are forced to conclude, therefore, that at the time the firm of Sax & Zekind was formed the assignor was indebted to her daughter as averred by defendants.

While acting as agent for his mother, and in the course of business, Ben E. Harris made sundry representations to creditors, and reports to commercial agencies, concerning assets and liabilities. One of the issues raised by the pleadings was whether or not the assignor delivered to the assignee all her nonexempt property. Such representations and reports concerning the assets were sufficiently near in point of time to the assignment to be admissible as tending in some—though perhaps very slight—degree to shed light upon the amount of property owned by her when the assignment was executed, since there was evidence having a tendency to show a discrepancy between the assets as declared in one or more of the reports, and the property received by the assignee; but, standing alone, such evidence would certainly be insufficient to prove retention of property by the assignor. It is claimed that the representations and reports so made by Ben E. Harris have a bearing also upon the inquiry whether the assignor was indebted to Salina Sax; and the doctrine announced in *Shauer* v. *Alterton*, 151 U. S. 607, 14 Sup. Ct. 442, is invoked. We do not think the contention is sound. Seven witnesses testi-

fied as to such representations and reports. Armstrong, who was credit man of one of the plaintiffs, exhibited a memorandum made by him in August, 1891, as the substance of an oral statement made by Ben E. Harris as to the general condition of the business. That memorandum is as follows: "Her son, who does business in her name, says will discontinue stores in Butte and Great Falls, and concentrate at Helena. Have in business $50,000, including $11,000 belonging to sister." Knowles, manager for R. G. Dun & Co. at Helena, testified that in a report made in 1891 Ben E. Harris included among his liabilities the following item: "Liability on stock in Butte City, $12,501.27,"—and that Harris "further stated that this liability at Butte, above referred to, was owing to his sister." Gaines, another manager for Dun & Co., testified that he had two interviews with Harris—one in February, 1889, and the other in February, 1890,—and that no specific mention was made of liability to Salina Sax; but the proof is that the payments by her had not been made in February, 1889, and that her remittances extended from November, 1889, to May, 1890. When recalled this witness admitted that, after his interview in 1890, Knowles, as local manager, reported the interview of 1891, in which Harris had expressly stated a liability of over $12,000 on the stock at Butte, owing to his sister; and Gaines produced, as part of his testimony, the 1891 report to Knowles, which was the latest received by Dun & Co. from Harris. Berry, clerk in the credit department of one of the plaintiffs, testified that Harris stated to him in August, 1891, that "he could not tell the liabilities definitely, but thought they were in the neighborhood of $39,-500." Witness Eddy testified to a report made by Harris in 1887, some two years before Salina Sax made any loan or advanced money to her mother. Rosenburg and Gunther testified, respectively, to reports made March 18 and July 7, 1891, in which he made no specific mention of indebtedness to Salina Sax, but merely included in the list of liabilities the amounts due to the banks, bills payable, and open accounts. Rosenburg was credit man of one of plaintiffs, and he testified that

Harris made statements to him from which he made memoranda, and carried these into his credit records; but he says that Harris avowedly based his statements on his inventory of February 20, 1891. Gunther, local manager for the Bradstreet agency, also says that, in the report made to him, Harris stated that the figures he was furnishing were taken from that inventory; and as his report to Knowles, manager of Dun & Co., was made in February, 1891, and contained the express statement, as afterwards confirmed by extracts from the records of the company produced by Gaines, that among the liabilities was a debt to his sister of $12,000 and over, and that six months thereafter, and later in the year than his report to either Rosenburg or Gunther, he stated to witness Armstrong that his mother had in business about $50,000, "including $11,000 belonging to his sister," we cannot regard the general memoranda of the two witnesses, made from oral statements by Harris professedly based upon his inventories of an earlier date, the details of which had been frankly reported to other witnesses, as tending to prove concealment by Harris, or that there was in fact no such indebtedness. Plaintiffs having clearly established the indebtedness by the mother to the daughter, we must treat the business relation so created precisely as if it existed between strangers.

Being thus led to the unavoidable conclusion that, when the firm of Sax & Zekind was organized, Bathsheba Harris was under a *bona fide* financial obligation to Salina Sax to the extent of about $12,000, we are brought to the consideration of the Sax & Zekind transaction, of which plaintiffs complain, free from the suspicion with with which counsel seem to look upon it. If in October, 1891, when the alleged sale to Sax & Zekind was made, Bathsheba Harris had actually paid or discharged that obligation in any way other than by the sale shown in this record, the suggestion would hardly be made that her right to make such settlement could be questioned; and we think that the views of counsel for plaintiffs upon this subject rest almost entirely upon their belief that no such debt in fact existed; for when the obligation is once conceded, or

shown to exist, the satisfaction of that obligation by the sale of merchandise is as free from any badge of fraud as a payment in money, or any other form of liquidation or settlement; and, as we have been unable to find in the record any substantial evidence tending to sustain the views of the trial court as to the nonexistence of the indebtedness, we are necessarily unable to share with counsel their presumptions touching the character of the alleged sale to Sax & Zekind. That the partnership was actually formed, and that Ben E. Harris, acting as agent for his mother, sold and delivered merchandise to the firm, no witness has questioned; and we cannot, without traveling without the record, and indulging in suspicions which ought to find no place in judicial action, justify the court below in finding that the settlement between Bathsheba Harris and Salina Sax was a fraudulent device to conceal assets belonging to the former. Much stress has been laid upon the fact that Ben E. Harris acted as agent for his sister, as well as for his mother, in arranging the details of settlement through the sale, and the fact that Harris acted for his sister in the conduct of the business of Sax & Zekind after the sale by the mother to them is given emphasis; but the right of these women to employ their relative to act for them with respect to the transaction cannot be seriously questioned, and we are satisfied that these circumstances should not, under all the evidence adduced, be treated as tending in any substantial way to prove the fraudulent or fictitious character of the sale. Plaintiffs did, however, introduce one witness (Neufeld, a commercial traveler,) for the purpose of showing that the sale was fictitious. He testified that he had a conversation with Ben E Harris, in Helena, in the latter part of November, or beginning of December, 1891. The talk took place on the street, and Harris "pointed to a store about a block further down the street than his mother's, as we were passing it, and said that place belonged to his mother, also; that they had sold it some time before to the party in possession, but he had not paid for it; consequently the store was still theirs." This declaration was received, not for the purpose of impeachment

of a witness, but as tending to show an admission made by Bathsheba Harris through her agent; but it was beyond the scope of the authority of Ben. E. Harris to make the admission on behalf of his principal. It was not relevant to any transaction of hers then pending, nor did it refer to property in the agent's possession, and can have no effect upon the right of either the vendor or the vendee, whose sale and purchase he is quoted as having pronounced to be unreal.

From the evidence presented we conclude, therefore, that the amount for which Annie Harris was preferred in the assignment was a just debt; that the Bathsheba Harris indebtedness to Salina Sax was *bona fide*, and that the sale from the former to the latter, and the crediting upon the purchase price of the amount of the seller's debt, was a valid method of discharging the several obligations from one to the other, and that, therefore, the sale to Sax & Zekind was not a fraudulent device to conceal assets of the debtor, and that the subsequent sale by the assignee to Frank was a valid transfer of the assets then in his hands; and that there is no proof that the purchase was made in the name of Frank for Bathsheba Harris.

Having satisfied ourselves, after many weeks of patient investigation, as to these important features of the transactions involved in this action, little difficulty is found in determining that the testimony of plaintiffs' witness Ben E. Harris, to the effect that his agency for Bathsheba ceased on the day after the assignment, is uncontradicted either by direct or circumstantial proof. True, this testimony was elicited upon cross-examination, but the witness remained the witness of the plaintiffs, and the evidence was brought out on proper cross-examination. It was therefore part of their case in chief. (Rice on Evidence, Sec. 285; see, also, *Casey* v. *Thieviege*, 19 Mont. 341, 48 Pac. 394, and *Boe* v. *Lynch*, 20 Mont. 80, 49 Pac. 381.) Moreover, if this item of evidence be eliminated, the result would be the same; for an assignment by the principal, for the benefit of creditors, of the subject-matter of the agency, revokes the authority of the agent, unless that authority is coupled with an interest, upon the ground that the

assignment devests the principal of control and management of his property, and confides the same to the assignee, under whose control the subject-matter then passes. (Mechem on Agency, Secs. 263, 265; 1 Am. and Eng. Ency. Law, 1227; and see *Williston* v. *Camp*, 9 Mont. 88, 22 Pac. 501.) Hence it becomes unnecessary to enter upon an extended discussion of the many questions raised by the record as to the admissibility of declarations made by Ben E. Harris, or of the testimony of others touching matters occurring after the assignment; nor is it needful to consider the distinction drawn by some courts between evidence of admissions made by the assignor, or his agent, while in possession of and concerning property not delivered to the assignee, and evidence of admissions relating to property received by the assignee, unless it shall appear from a further examination of the record that some other property was retained by the assignor personally, or through her agent—otherwise these questions are impertinent.

One other feature of the case remains, upon which counsel for plaintiffs have relied,—the alleged retention and concealment of assets (other than those delivered to Sax & Zekind) by the assignor. They insist that this has been so thoroughly demonstrated that the judgment should be affirmed, even if the proof fails to sustain any of the other allegations of the complaint. The findings which cover this subject are as follows: "That five or six boxes of merchandise, weighing from two hundred and fifty to three hundred pounds each, were taken from the cellar of the store at No. 119 shortly before the assignment was made, on the 14th day of December, 1891, to the cellar of the residence of the said B. Harris, on Ewing street, Helena, Montana; that said goods belonged to the assets of said B. Harris, and were fraudulently concealed and not turned over to the assignee, for the purpose of defrauding the creditors; that, shortly after B. Harris commenced business under the name of the 'Cannon Ball,' said boxes of merchandise were removed from said cellar in the residence of B. Harris to the store on Main street, and there-

after constituted a portion of the stock of goods of the defendant B. Harris at that place; that a large amount of merchandise belonging to the defendant B. Harris was stored in the warehouses of the Great Northern and Northern Pacific Railways in the city of Helena some time before the purchase of the stock of goods at the assignee's sale as above set forth; that upon the purchase of said stock of goods said goods so warehoused were immediately transferred to the store at the Cannon Ball, and constituted a part of the stock of goods with which the defendant Harris was doing business at that point; that said goods so transferred from said depots either belonged to the original stock of merchandise owned by the defendant Harris at the date of the assignment, and fraudulently kept out of said assignment, or were purchased with money belonging to the business of said B. Harris at the date of said assignment and which should have been turned over to the assignee; that the defendant B. Harris, through her general agent and manager aforesaid, continued to conduct business at Nos. 119 and 19 Main street, and at the Phœnix, with the stock of goods constituted as hereinbefore set forth, until the same was removed to Chicago, and disposed of there, in the fall of 1893; that during all of the said time the defendant B. Harris, through her agent, was in the actual possession of a portion of said goods belonging to her stock of merchandise owned by her at the date of the assignment." These findings are based mainly upon the testimony of several clerks and teamsters, and of the freight agent of the Montana Central Railway Company. In so far as the evidence relates to dealings between the Famous Clothing Company, as conducted by Sax & Zekind, or by Salina Sax alone, and the Cannon Ball or Phœnix Clothing Company, as conducted by Frank through his agent, we deem it immaterial, as we have already held that the record contains no proof by which the presumption of good faith and validity of the sale to any of these persons has been rebutted; and we are therefore unable to appreciate the pertinency of proof as to subsequent business dealings between them. For like reasons we think that none of

the testimony in respect of shipments of goods to Great Falls, either by Frank or the Famous Clothing Company, is material or relevant. This disposes of the testimony of Cohen, Davis and Wallace, and leaves for consideration the evidence given by Morteson and Monroe. Morteson testified that he was in the employ of the assignor when the assignment was made, worked for the assignee afterwards, and remembered when the Cannon Ball was opened by Frank. Referring expressly to a date subsequent to the opening of the Cannon Ball, he stated: "One day several boxes came there. The first were marked 'S. S. Harris & Co.' They were put on the sidewalk on Jackson street, and then carried into the store. There was about a dozen of these boxes,—maybe less, maybe more. I guess there was clothing in the boxes, maybe some furnishing goods. I think B. E. Harris told me to turn the name on the boxes down on the sidewalk, and I did it. I don't know who ordered those goods marked 'S. S. Harris,' and I don't know where they came from. I don't know that they were ever entered on the books of H. L. Frank. These goods that came marked 'S. S. Harris' were unpacked, and I took them and put them on the shelves and tables with the rest of the goods. In November, 1891, there were other goods came into the store. There was some furniture, and crates of household furniture. I think they came from Great Falls. We took them downstairs, in the basement. They remained there some weeks, and were then shipped back to Great Falls. They were shipped to Hattie Harris, Great Falls. It was about five months after the assignment that the goods marked 'S. S. Harris,' or 'Mrs. Sarah S. Harris,' came to the store, and it was after H. L. Frank had taken charge. These goods came very close to the time they opened up as the Cannon Ball, but I don't know when they were ordered." Monroe testified that in 1891 and 1892 he was a teamster working for one Smith, who was in the "transfer business," that he recollected the time of the assignment, and that the house was reopened by Frank as the Cannon Ball. "I hauled on different

occasions a good many goods there, but on one occasion especially, I hauled goods there to the Cannon Ball Clothing House, and in one case there was some goods that I hauled there at the back of the store that Mr Harris made me turn upside down. The boxes were marked 'B. Harris.' That was after the store was opened up under the name of the 'Cannon Ball.' It was in the spring of the year. I should judge there might have been a dozen such boxes. They were new boxes. Usually, when we hauled goods to that place, we generally turn the boxes right side up. The mark on top is customary, but this time he told me to turn them wrong side up, and I did so at his request. I got those boxes at the Montana Central depot. Again I hauled some boxes from that store to Ben Harris' house on Ewing street. If I recollect right we got them out of the cellar at 119 Main street. This was also after the store opened up as the Cannon Ball. There were five or six boxes, and I put them in the cellar at his house." He also stated that he hauled some boxes away from Harris' house, but said: "I can't remember whether we took them to the clothing store, or to the freight house of the Montana Central. I think it was after they opened up as the Cannon Ball that we hauled them away from the house. I think it was in the spring of the year. We hauled them away at the instance of old Captain Smith. I was working for him at that time." He stated that the boxes which he hauled to the cellar of the Harris house were common dry goods boxes, weighing from 250 to 300 pounds each, and that they were old boxes renailed. On cross-examination he said: "The time I hauled these boxes was after the store was opened as the Cannon Ball by H. L. Frank. I unloaded the boxes at the rear end of the store on Jackson street. I think this young man, Morteson, was there at the time. I think it was in 1892 that Ben Harris first opened up his store at 119 Main street. I think it was before the assignment. I can't say exactly what time of year it was. I think it was in the spring. I think the assignment was made in 1892. I don't know exactly. I don't know how long he had been at 119 before he made the

assignment. He had been there as much as a month, and may have been there longer for all I know. At the time I unloaded these boxes there was nobody around but Ben Harris and myself. I am quite certain the boxes were marked 'B. Harris.' I don't think they were marked 'S. S. Harris and Company.' I cannot fix the month of the year 1892 that this occurred. I remember the Fourth of July. I was pretty full of booze at that time. This is not my usual condition. I did not see the waybill or bill of lading for those goods, and I don't know what was done with the boxes after I unloaded them on the sidewalk on Jackson street. I think it was in the spring of 1892, also, that I hauled the boxes from 119 to Ben Harris' house; but it was after I hauled the boxes from the depot, if I remember right. I hauled the goods from the store to his house at Captain Smith's request. I know Myer Harris. I don't know whether he had anything to do with the hauling of these goods to Ben Harris' house or not. Later I hauled those goods from the house down to the depot, or to the store. They were marked 'Hattie Harris,' or 'Annie Harris.' I would not be sure. They may have been household goods, for all that I know. Mr. Ben Harris gave me directions as to how to get the boxes at the house. I took the same number of boxes away from the house that I took up there—five or six boxes. I don't know whether there were any barrels among them or not. That is the only occasion that I ever took goods up to the store that Ben Harris told me to turn the boxes wrong side up." Sawyer, local freight agent of the Montana Central Railway Company, produced a waybill showing a shipment from Great Falls to Helena on October 31, 1891, from B. H. to B. H. It showed that the shipment consisted of household goods only, and he testified that they arrived in Helena November 1st or 2d. He produced, also, a waybill, dated May 3, 1892, for a shipment of furniture from one Curtin, at Helena, to Mrs. Harris, at Great Falls, and identified four other bills of lading, each of which showed the arrival in Helena from Chicago in April, 1892, of boxes of clothing and furnishing goods. He testified that the

bills showed that the goods were shipped from Chicago about April, 1892, and arrived at Helena about the 27th of April. Nine other waybills were received in evidence, showing shipments to S. S. Harris & Co., which arrived in Helena from Chicago during the same month.

The testimony of Morteson is in conflict with that of Monroe, that of Monroe is inconsistent with the admitted facts in the case, and plaintiffs deemed it necessary to correct Monroe's statements in order to adapt his testimony to their theory of the case, and to justify the findings; but both of the witnesses agree that all the transactions testified to by them occurred about five months after the making of the assignment, and some time during the spring of 1892. Learned counsel for plaintiffs assure us that "Monroe gets his dates mixed," but we are asked to substitute for these errors those dates which would sustain plaintiffs' views; and we are expected to read the rest of Monroe's testimony with a feeling of confidence that his ideas and recollections are not "mixed" as to anything except the dates, although the only portion of his testimony which is supported by Morteson (who was present at the time the hauling was done) is that relating to the date when these occurrences took place. Monroe said that he hauled about a dozen boxes to the Cannon Ball in the spring of 1892; that the boxes were marked "B. Harris," and not "S. S. Harris & Co.;" that Morteson was present, but that no one assisted him to unload them; and that at the request of Ben E. Harris he turned the boxes upside down. Morteson testified that the boxes were marked "S. S. Harris & Co.," and that he turned them upside down at the request of Harris. The freight agent of the railroad company testified that no shipments marked "B. Harris" were received at that time over the Montana Central Railway. It would seem safe, therefore, to conclude that Monroe is also confused as to the marks on the boxes, or that either he or Morteson is in error as to who hauled them, who unloaded them, and who turned them upside down; but, however this may be, there seems to be no controversy raised by the evidence as to the fact that

whoever hauled them, and whoever placed them on the sidewalk marks down, did so in the spring of 1892, long after the assignment, and did so at the request of Ben E. Harris, who was not then the agent of the assignor.

Monroe testified also that he hauled five or six boxes from the cellar of the Cannon Ball store to the cellar of Ben E. Harris' house, and that later he hauled them from the house either to the depot or back to the store; that these boxes were marked "Hattie Harris," or "Annie Harris;" and that they may have contained household goods, though he was unaware of their contents. These five or six boxes which were removed from the cellar of the Cannon Ball were received in the spring of 1892, as plaintiffs' witnesses testified, or else they were received prior to the assignment, and were in the cellar of the house at the time when all its contents were delivered to the assignee, as found by the court; and as all the goods which were delivered to the assignee were subsequently sold by him, either at retail, or in bulk to Frank, and as Morteson testified that the twelve boxes were unpacked by him, and their contents placed upon the shelves and tables in the Cannon Ball, it would seem that these various boxes of merchandise, about which so much has been said, were the property of Frank, or at least that the twelve boxes were Frank's, and the five or six boxes were his, or else belonged to Annie or Hattie Harris. We are unable to see that any light is shed by either of these transactions upon the good faith of the previous assignment by Bathsheba Harris. We cannot conclude that an assignment made by her in December, 1891, was fraudulent and void because in the spring of 1892 sundry boxes of merchandise marked "S. S. Harris & Co.," or even "B. Harris," were received by H. L. Frank, and were directed by Frank's agent to be inverted on the sidewalk; nor would we be warranted in holding that the assignment was fraudulent even if the proof shows that Ben E. Harris, for himself, or while acting as agent of Frank, took five or six, or any other number, of boxes from the cellar or other part of Frank's stores and properly or improperly placed them in

his own house or elsewhere. The foundation of all plaintiffs' contentions as to this branch of the case is the assumption that the sales to Sax & Zekind and to Frank were fraudulent; and, as already stated, with this unsustained theory eliminated the other questions are of easy solution.

Having determined from the evidence that the agency of Ben E. Harris for Bathsheba Harris ceased with December 14, 1891, that the transfer to Sax & Zekind prior to that time was a *bona fide* sale, and that the sale to Frank was free from fraud affecting the assignment, we must hold that the evidence relating to the transfer, exchange or handling of goods to or from the business house of Frank, or that of Sax & Zekind or Salina Sax, was not pertinent to the issues, and that the acts, declarations or admissions of Ben E. Harris after December 14, 1891, were inadmissible for the purpose of showing fraud in the assignment made on that day. It may be that, at the assignee's sale to Frank, Ben E. Harris, or some other person, was the real purchaser; but the record is barren of evidence tending to prove that Bathsheba Harris knew of any act of her former agent, of Frank, or of the assignee, performed after the assignment. If Ben E. Harris concealed the addresses upon boxes of merchandise received in the spring of 1892 at the house conducted in the name of Frank, he did not, so far as the evidence shows, do so as the agent of Bathsheba Harris, and hence his reasons for so acting are not relevant on the question of the good faith of the assignment.

Counsel for plaintiffs devote much argument to the inferences of fraud which they ask be drawn from the situation and relation of the parties against whom fraud is alleged, and from certain acts done and declarations made by Ben E. Harris. Among these are the insolvency of Ben E. Harris; the advanced age of his mother; the fact that after the assignment he became agent for Frank, and continued to act as agent for Salina Sax; his seeming unwillingness as a witness, and evasion of questions. All the matters so persistently and earnestly pressed upon us by counsel have been considered and given due weight. Plaintiffs have been unable to present any

evidence which justifies the inferences deduced by them. Mere suspicions may be engendered, and speculations indulged, but these fall short of that distinct and clear proof of fraud necessary to the avoidance of a written contract attended with every presumption of validity.

The judgment and the order are reversed, and the cause is remanded, with directions to grant a new trial.

Reversed and Remanded.

PEMBERTON, C. J. I concur in the conclusion reached by Mr. Justice Pigott except as to the legal effect of the proceedings supplemental to execution, referred to and treated in the opinion, upon which question I express no opinion.

HUNT, J. (dissenting)—When this case was first presented to the supreme court, in December, 1896, I took no part in the hearing or consideration of the same. This appears by the brief order filed by the court affirming the judgment, and participated in by the Chief Justice and Mr. Justice De Witt. *Wilson* v. *Harris*, 19 Mont. 69, 47 Pac. 1101. In the order of the court, however, this language was used: "The case was argued on December 7, 1896, before Mr. Chief Justice Pemberton and Mr. Justice De Witt; Mr. Justice Hunt deeming himself disqualified." The words which purported to state my position were inadvertantly used by the court. I never deemed myself disqualified, nor was I disqualified under any possible construction of the law. I am neither a party, nor am I directly or indirectly interested in this action or any proceeding had therein. I am in no way related to either party; I have never been attorney or counsel for either party; nor did I render or make the judgment, order or decision appealed from (see Section 180, Code of Civil Procedure 1895); nor have I any bias or prejudice of any kind whatever. In declining to sit at the first hearing I merely yielded to a personal disinclination to review a case which was the outgrowth of proceedings had in another suit, in which, as district

judge, I had made the order authorizing this appealed suit to be instituted. These are the facts: In 1892, plaintiffs, in actions upon debt, recovered judgments by default in the district court against defendant B. Harris. At that time I was a judge of the district court in and for Lewis and Clarke county, and rendered several, if not all, of such judgments. None of these judgments was appealed from. Thereafter, in due form, under Section 353, Code of Civil Procedure 1887, affidavit was filed and proof was made to the satisfaction of the district court, of which I was the judge, that Moses Morris (the original assignee of B. Harris) and Sax & Zekind had in their possession property of the defendants in a large amount. Said parties were then ordered to appear and answer as required by the statute. Brief hearing was had before me as judge, and under Section 356 of the Code of Civil Procedure of 1887, it having appeared that the persons alleged to have property of the judgment debtor claimed an interest in the property adverse to the judgment debtor, and denied the debt, as judge I made an order authorizing the judgment creditors to institute an action against said Morris and Sax & Zekind for the recovery of the interest claimed; and an injunction was issued forbidding the transfer or other disposition of the interest claimed, or debt, until an action could be commenced and prosecuted to judgment. Thereafter this present action, in the nature of a creditors' bill to set aside the assignment by B. Harris to Moses Harris, was instituted; and although it was pending in the district court before I retired as a judge thereof, and although I may have made some order in the initial stages of its progress, the questions raised on this appeal and the points considered by this court have never been presented to or considered by me. The cause was proceeded with, tried and determined by the Honorable H. R. Buck, sitting as a judge of the district court: and from a judgment rendered by him, and from his order overruling a motion for a new trial, this appeal is taken. On January 4, 1897, two days after the affirmance by this court of the judgment of the district court, Mr. Justice De Witt re-

tired as a member of the supreme court. His successor was the aforesaid Honorable H. R. Buck. Within the time allowed in which to move for a rehearing, and just after Mr. Justice Buck became a member of the supreme court, the appellants herein filed a motion for a reargument and a rehearing. Briefs were submitted, not alone upon the points of law relied upon, but upon the attitude of the case before the court under the peculiar situation that had arisen. Justice Buck, being disqualified, did not participate at all. Plainly, the parties were entitled to a decision of the motion, at least as to the competency of the court to which the motion was addressed. Confronted with so unusual a situation, my duty was to subordinate all personal disinclinations, and to act with the chief justice in first deciding whether there were two justices qualified to act. To this inquiry there could be but one answer: A majority of the court (the chief justice and I) were qualified. As my right to sit existed, it was my duty, of course, to act. After determining this point, we decided that, although the appellants had not brought themselves strictly within the rules governing rehearings by this court, nevertheless, under the circumstances, it seemed just and proper that the case should be orally reargued before the court consisting of the chief justice and myself. This was agreeable to all counsel, and the case was thereafter argued to a majority court, Justice Buck not sitting. Before a decision was reached, however, Mr. Justice Buck died, and Mr. Justice Pigott became a member of the court. The importance of the case warranted the court, of its own motion, to unanimously order a resubmission of it to the entire bench. This was agreeable to all counsel. It would have been more agreeable to me to have again refrained from sitting, but I felt it a duty to take part in the hearing. It was accordingly reargued by counsel to the full court, and again taken under advisement. Since its submission our earnest attention has again been given it, in a conscientious effort to reach a correct result; and, while it is impossible for the court to unanimously agree upon the law, I feel it is to the interest of all parties concerned that a conclusion has finally been arrived at.

1. I disagree with the majority of the court in their interpretation of the attachment statutes in force prior to the adoption of the codes.

My reasons for dissenting are these: By the fifth subdivision of section 186 of the Code of Civil Procedure of 1887, the method of attaching personal property of the defendant which is capable of manual delivery is by taking it into custody; while the method of attaching personal property belonging to the defendant, and not capable of manual delivery, and not in defendant's actual possession, is by leaving with the person having possession or control of such property a copy of the writ and a notice of attachment. The operation of this statute may be exemplified by an instance of an attachment of a horse in the possession of the defendant, and an attachment of a growing crop belonging to the defendant, but in the control and possession of a servant or agent of the defendant. To attach the horse, the sheriff must take it from the possession of the defendant, and into his own custody—it is capable of manual delivery; while, to attach the growing crop, which is incapable of manual delivery, he need only serve the copy of the writ and notice provided for by section 186. The object of this fifth subdivision is principally to extend the remedy of attachment to property belonging to defendant, yet not capable of manual delivery. The statute thus enables the creditor to gain a lien on all of the personal property of a defendant, whether capable or incapable of manual delivery, and whether in or out of defendant's actual possession or control.

I do not doubt the right, under the statute cited, to seize the property of a defendant in the possession or control of a third person by taking it into actual custody; and, if there were no other statutes upon the subject besides those above referred to, the remedy would doubtless be confined to an actual taking, if capable of manual delivery. The Utah decision (*Kiesel* v. *U. P. Railway Co.*, 21 Pac. 499) cited by Justice Pigott would then be entitled to much consideration. But, in my judgment, no construction of the attachment laws

is correct which fails to give full effect to section 188, and other following sections of the Compiled Statutes. I think that section 188, overlooked apparently by the Utah decision, was designed to provide another mode of attaching personal property belonging to a defendant, in the possession or under the control of any person other than the defendant himself. The mode prescribed is by serving upon the person in possession, or having control of, the property, a copy of the writ, and a notice that the property is attached in pursuance of such writ. The service of the copy and notice constitutes the attachment, and not merely a procedure in aid of an attachment. My learned associates admit that, by section 186 and its provisions, such a service constitutes an attachment if the property is not capable of manual delivery, but deny that it so operates if the property is capable of such delivery. But if they are right, as they clearly are, in the view that the mere service of the copy and notice is an attachment where the property is not capable of manual delivery, it is difficult to see why a like service made under section 188 is not equally effective as an attachment of any personal property, whether capable or not of manual delivery, of the defendant in the hands of a third person. I cannot assent to any limitation of the words of section 188 by which the meaning of the section is interpreted to confine an attachment to property not capable of manual delivery. Its provisions are, in effect, that if any person has in his possession or under his control "any credits or other personal property belonging to the defendant," etc., "the sheriff shall serve a notice that such credits or other property * * * are attached in pursuance of such writ." The essence of the section is to enable plaintiff to acquire a lien by the service of a copy of the writ of attachment and the notice indorsed thereon. No qualification of the words "other personal property" appears, as in the New York statute, for instance. (Voorhees' Code, Sec. 235.) They apply as well to one class of personal property as to another, and I cannot import into the statute restrictions which confine its applicability only to property not capable of

manual delivery. Confirmation of this interpretation is found in section 190, wherein it is provided that any person having in his possession personal property belonging to the defendant may be brought before the court, and examined on oath respecting the same. The court may then order personal property capable of manual delivery to be delivered to the sheriff upon such terms as may be just, having due regard to any liens thereon. If the only method of attaching personal property of a defendant which is capable of manual delivery is by actual seizure, the court, if it can acquire any jurisdiction at all to order its delivery, must order it delivered to the sheriff. But I think that there is no such mandatory provision. The court may order it turned over, but is not obliged to do so. The statute recognizes, by implication, the fact that the property can as well be left in the possession of a third person, and yet be subject to the attachment as effectively as if delivered over to the sheriff. Section 189 likewise contemplates that property attached pursuant to the provisions of section 188 need not pass into the hands of the sheriff, although capable of manual delivery; for it provides that one having possession of personal property belonging to the defendant, and served with the copy of the writ and notice required, shall be liable to the plaintiff for the amount of the property until the attachment is discharged, or any judgment is recovered, unless such property be delivered up or transferred. If the only method of acquiring a lien of attachment upon personal property of the defendant in the hands of a third person, capable of manual delivery, is by taking it into actual custody, this statute inconsistently authorizes such third person possessing such property to yet remain in possession of the same, and simultaneously become liable for property never taken into custody at all, and therefore, according to the majority opinion, never attached at all; for section 189 is based upon the fact being undisputed that there is property in the hands of such third person, and that he has been served with the copy of the writ, but has never parted with the possession of the personal property so held by him, and does not intend to part

with it. The many difficulties of proceeding in execution after judgment are no greater in a case where personal property in a third person's possession is attached, than where a debt or credit is. Courts of equity can solve such questions with due reference to liens and claims of others.

Johnson v. *Gorham*, 6 Cal. 196, cited by the majority opinion, sustains the conclusion reached by my associates; but the court gave no reasons for its decision, cited no books, and did not attempt to analyze the various statutes of the state of California.

The doctrine of *Biglow* v. *Andress*, 31 Ill. 323, also cited, is certainly not followed in the case of *Smith* v. *The Clinton Bridge Co.*, 13 Bradwell App. Court Reports 572, where the court said: "Where a writ of garnishment is served upon a debtor, it must create a qualified lien, or have the effect of a qualified appropriation of the indebtedness by the law to the objects and purpose of the attachment, that is binding alike upon the defendant, the garnishee and third parties; otherwise the garnishment might always be rendered wholly nugatory and futile by payment or assignment of the debt."

In *Northfield Knife Co.* v. *Shapleigh*, 24 Neb. 635, 39 N. W. 788, the court said: "We are aware that in *Bigelow* v. *Andress*, 31 Ill. 322, it was held that garnishment imposed no lien upon the goods in the garnishee's hands, and did not put them in *custodia legis*. If this was the rule, proceedings by garnishment would be an expensive farce, which would give the attaching creditor no rights under the attachment. Neither can the right be restricted to the personal liability of the garnishee, as he might be insolvent, or unable to pay the value of the property. We hold, therefore, that garnishment is an attachment of the goods in the hands of the garnishee, and that such goods are not subject to levy and sale upon process thereafter levied during the continuance of said attachment." (See, also, *Reed* v. *Fletcher* (Neb.) 39 N. W. 437.)

It is true that the Nebraska decisions were where the property was mortgaged by chattel mortgage, but the doctrine of

the cases is that the garnishment proceedings imposed a lien upon the effects in the garnishee's hands.

The case of *Focke, Wilkins, Lange et al.* v. *Leon and Blum* (decided in 1891 by the Supreme Court of Texas) 82 Tex. 436, 17 S. W. 770, in its facts, is very like the case at bar. An assignment for the benefit of creditors was made. Actions were brought wherein the person who held possession of the stock of goods was served with writs of garnishment. Subsequently other creditors by attachment seized the goods, and took them from the possession of the garnishee. It was decided that, although the garnishee was not a debtor owing a sum of money, but had in his possession effects subject to execution and to the satisfaction of plaintiffs' claim belonging to the debtor firm at the time of the service of the writ of garnishment upon him, the service or levy of the writ of garnishment, which was virtually a process of attachment, had the effect of placing the property of the debtor in the hands of the garnishee at the time in *custodia legis*, and of creating at least a right *ad rem* or *quasi* lien upon the effects or property, in favor of the plaintiffs in the writ, to secure the payment of the debt sued upon, and evidenced by a valid judgment, superior to the rights of other creditors subsequently attaching the property. The Texas court expressly disapproved of the decision in *Johnson* v. *Gorham*, *supra*, and based their decision upon principle and authority.

These several cases cited, and the California case referred to, were presented to this court by the briefs of counsel in the case of *Montana National Bank* v. *Merchants' National Bank*, *supra*. The California doctrine was there disapproved of; for it was held that, as to a chattel capable of manual delivery in the possession of a garnishee, an inchoate lien or right is acquired by garnishment as to such chattel. I therefore find myself, in this dissenting opinion, in direct accord with the views of this court expressed in a late very important case, where the principal authorities relied upon by counsel in this case were considered by the court in arriving at the conclusions reached in that decision.

Attachments of goods and effects in the possession of third persons by service of writs are of old practice in our country. In Lousiana, in 1820, in *Scholefield* v. *Bradlee*, 8 Mart. (La.) 495, it was argued that no sufficient levy of an attachment was made upon goods, "inasmuch as there was no seizure or corporal possession taken by the sheriff." It was decided that an attachment in the hands of a garnishee was sufficient to place the property in the custody of the law, and that after service of such an attachment the sheriff had no right to go and take the property from the garnishee.

In *Erskine* v. *Staley*, 12 Leigh, 406, a service of an attachment process upon a garnishee by creditors of an absent debtor was held to be equivalent to an actual levy, and that, while the effects might remain in the hands of the garnishee, they were under the control of the court.

That the garnishee might be left in possession, where personal property capable of manual delivery was attached by constructive seizure, was also held in *Moore and Davis* v. *Byne and Hust*, 1 Richardson S. C. 94. (See, also, *Dennistoun & Co.* v. *N. Y. Croton & Steam Faucet Co.*, 6 La. Ann. 782; *Rennecker Glover* v. *N. J. Davis*, 10 Rich. Eq. (S. C.) 289; *Beaumont* v. *Eason*, 12 Heiskell, Tenn., 417; Rood on Garnishments, Sections 193, 194,—where the principles of the lien garnishment are discussed and applied within the limits of the principles which I believe should govern.

2. Inasmuch as I believe plaintiffs acquired liens by attachment, it is unnecessary for me to express an opinion upon the question whether or not the plaintiff's action is justified even without a showing of equitable lien by actual seizure. That important proposition of law not having been presented to the court on the argument, I prefer to reserve an opinion upon it.

3. I also dissent from the reasoning and argument of the majority opinion upon the evidence introduced. I agree that there is not sufficient evidence to show participation by H. L. Frank in any actual fraud in the sale to him by the assignee,

but I regard that matter as having nothing at all to do with the question of fraud in or upon the assignment itself. To recite the evidence upon which the jury found that the assignment in question was made with intent to hinder, delay and defraud creditors would take up too much space in a dissenting opinion. Suffice it to say that it was substantial, ample, voluminous. The lower court adopted the findings, made its conclusions, and thereafter denied the motion for a new trial. The jury and the judge of the district court saw the witnesses and heard them testify. This is of the greatest advantage, especially in cases of alleged fraud; and where, as here, the record fully sustains the action of the district court, I cannot concur in setting it aside. Believing that there were no prejudicial errors, I think the judgment should be affirmed.

AMERICAN EXCHANGE NATIONAL BANK, APPELLANT, v. WILLIAM ULM, ET AL., RESPONDENTS.

[Submitted April 4, 1898. Decided July 18, 1898.]

Negotiable Paper—Collateral Security—Bona Fide Purchaser—Notice.

A promissory note payable to the plaintiff was executed by the directors of a bank, including the president, to whom it was delivered for the purpose of borrowing money for the bank. The president used the note as collateral security for his own note to plaintiff, and the money thus borrowed was drawn by a check to the order of the cashier of the bank, which subsequenty transferred the proceeds to the private use of the president. There was nothing on the face of the note to indicate for what purpose the note had been given. *Held*, that the plaintiff was not bound to ascertain for what purpose the note was given; and that the makers were liable.

Appeal from District Court, Cascade County; C. H. Benton, Judge.

ACTION by the American Exchange National Bank against William Ulm and others. There was a judgment for certain defendants, and plaintiff appeals. Reversed.

Statement of the case by the justice delivering the opinion.

Suit by plaintiff and appellant bank upon a promissory note, copy of which is as follows: "$10,125.00. Chicago, October 25, 1892. Six months after date we promise to pay to the order of the American Exchange National Bank ten thousand one hundred and twenty-five dollars, at Chicago, value received. Interest at the rate of —— per cent. per annum. [Signed] Wm. Ulm. E. R. Clingan. John Sinclair. Will Hanks. S. N. Dickey. H. P. Rolfe. A. F. Longeway. T. E. Brady. A. Nathan."

The plaintiff credited certain payments upon the note, the last payment so credited being dated January 5, 1895. The balance sued for was $4,625, with interest. All the makers were made defendants. Certain of such makers answered to the effect that the note was signed by them, and delivered to the defendant Hanks, for the sole purpose of enabling Hanks to borrow thereon from the plaintiff the face of said note, for the use of the Merchants' National Bank of Great Falls, Mont., of which bank all the defendants were directors and said Hanks was president; that said Hanks, after receiving said note for the purpose aforesaid, delivered the same to the plaintiff bank, without authority, as collateral security for the payment of a certain promissory note for $10,000, executed and delivered by said Hanks to the plaintiff for a loan made by Hanks from the plaintiff for his own use, and that none of the makers of the note, other than Hanks, ever received any consideration for or on account of the note, and that no consideration was received by the Merchants' National Bank. Defendants also pleaded ignorance of the fact that the note had been delivered by Hanks to the plaintiff bank as collateral security for his own note until after the payments credited on the note had been made by them. They set up a counterclaim for the amount of said payments. Defendants Hanks and Sinclair were not served and did not appear. Judgment was rendered against the plaintiff, and in favor of defendants, who appeared and answered for the amount of their counterclaim. Plaintiff appeals.

Leslie & Downing, *Swift*, *Campbell & Jones*, and *H. G. McIntire*, for Appellant.

J. P. Lewis and *A. J. Shores*, for Respondents.

Hunt, J.—Inasmuch as there was practically no dispute as to the facts of the case, they may be stated as follows: The Merchants' National Bank of Great Falls, Mont., had an account with the American Exchange National Bank of Chicago at the time that the note in suit was transferred to the plaintiff bank. The Great Falls bank suspended in July, 1893. All of the defendants were directors of the Great Falls Bank, and Will Hanks was its president at the times hereinafter mentioned. In September, 1891, Hanks solicited a loan for $10,-125 for six months from the plaintiff bank. He offered plaintiff his individual note, and as collateral security a note for the same amount, on six months' time, signed by the defendants, Rolfe, Ulm, Longeway, Sinclair, Dickey, Clingan and Nathan, and also by R. R. Hotchkiss, D. H. Churchill and C. H. Austin, who were all at that time directors of the Merchants' National Bank of Great Falls. The Chicago bank was willing to make the loan, but objected to discounting a six-months' note; so it was agreed that Hanks should make his individual note for a shorter time, with the agreement that it could be renewed. On September 10, 1891, Hanks forwarded to the Chicago bank his individual note for $10,125, payable to the order of the Chicago bank 40 days after date, and sent therewith a note for the same amount, bearing the same date, payable six months after its date, to the order of the Chicago bank, which note was signed by Hanks, Rolfe, Ulm, Hotchkiss, Longeway, Sinclair, Churchill, Dickey and Clingan. Upon receipt of the note in Chicago, on September 15, 1891, the plaintiff bank discounted Hanks' note, and placed the full amount to his credit, and took the other note as collateral security, according to the arrangement with Hanks. Upon the same day of the receipt of the notes the Chicago bank received from the Great Falls bank a check drawn by Will Hanks upon the Chicago bank, to the order of George A. Wells, who was

cashier of the Merchants' National Bank of Great Falls, for the sum of $10,125, which check had been indorsed by Wells to the Chicago bank for account of the Great Falls bank, and which was sent by the Great Falls bank to the Chicago bank for credit to the account of the Great Falls bank. The Chicago bank paid the check by charging the same to the account of Hanks, and crediting the amount to the account of the Great Falls bank. But, however this might have been, it is conceded by the plaintiff that, "in the eye of the law," the use of the money by Hanks was not for the benefit of the bank, and was therefore a misappropriation of the proceeds of the note. Upon October 23, 1891, Hanks' note became due, and, according to the understanding originally had, it was renewed by another note for the same amount, payable on demand and in the same form. On March 26, 1892, Hanks delivered to the Chicago bank a new collateral note, and the first was surrendered to him. This new note ran for three months, and was signed by the same parties as the first note, except that Nathan signed in place of Hotchkiss. This note was held by the Chicago bank as collateral security for Hanks' demand note, until during October, 1892, when Hanks delivered to the Chicago bank a third note as collateral security for his demand note, and the second collateral note was then delivered to Hanks by the bank. Brady signed the third collateral note, and Churchill did not. The Chicago bank held the last-described note as security for Hanks' demand note, and it is the subject-matter of this action.

It also appeared in evidence that Hanks represented to the defendants, who made the first collateral note, that the Great Falls bank, of which they were all directors, needed funds, and that the Chicago bank would discount a note signed by them and the other makers, and that they thereupon signed the note and gave it to Hanks for discounting in the American Exchange National Bank, for the use of the Great Falls bank; that they signed the second note as a renewal of the first, and the third as a renewal of the second; and that they were ignorant of the use to which Hanks had put the three notes, or any

of them, until after they had made the several payments on the third note which were included in their counterclaim.

The defendant Nathan signed the second note upon like representations made by Hanks, and for the same purposes, but in ignorance of the first note. Brady signed the last note upon like representations made by Hanks, and for the same purposes that the other signers had signed the note, and he, too, was ignorant of the use to which Hanks put the note until after the payments had been made.

The Chicago bank had no knowledge or notice of the manner in which, or the purposes for which, Hanks obtained the signatures to the collateral notes, or either of them, and no knowledge or notice that said notes, or any of them, were given to Hanks to be discounted for the use of the Great Falls bank, but took the paper in good faith, as security for the money loaned to Hanks, and never knew of the purposes for which the collateral notes were delivered to Hanks until after it had received all the payments set up by the defendants in their counterclaim.

There was nothing upon the face of the note in suit to indicate to the plaintiff what the purposes of the makers were in intrusting it to Hanks. It was an ordinary negotiable note, with several makers, in the hands of one maker, who was known to the plaintiff as the president of a bank with which plaintiff dealt in common banking intercourse. "When a note is executed for the purpose of raising money in the market, although made payable to a particular bank or firm, it is well understood that this is generally regarded by business men as rather a formal than a substantial part of the note. If the note were made payable at a particular bank, to the order of the maker, it would be much the same thing. So, too, if made payable to bearer generally. The name of the person to whom the note is payable is mere form. It is understood that it is going into the market as money, and in exchange for money, to any party who will make the discount. If negotiated at the bank, it may pass into other hands the next hour." (*Keith* v. *Goodwin*, 31 Vt. 268.) The rule is, too, that one who

signs negotiable paper for the accommodation of another confers authority on the person accommodated to bind him (the accommodation party) in favor of third persons by the issue of the paper. After negotiation, the maker of such paper is bound to the payee, or indorsee, or holder. Respondents can claim no more favorable position than that of accommodation makers.

Let us apply these principles to the actual facts. The note in suit was negotiated for the benefit of the bank, although plaintiff, in ignorance of the real purposes of the note, loaned the money to Hanks. This appears from the evidence, which shows that, after the note was deposited as collateral, Hanks drew a check for the amount of it to the order of Wells, who was cashier, who in turn deposited the amount to the credit of the Great Falls bank, and to whose credit it was duly placed by the Chicago bank. Thereafter Hanks, by a transaction with the cashier of the bank, seems to have obtained the money. The makers of the note were not injured in any way by the act of Hanks in pledging the note in the manner in which he did, for it was not until the amount of the loan was credited to the Great Falls bank that Hanks committed wrong against these defendants. He could have done the same thing if he had discounted the note, and had put the funds directly to the bank's credit instead of his own. The object of the note was to get money for the Great Falls bank. The makers turned the note over to Hanks, that he might carry out that purpose, and he did carry it out, but thereafter misappropriated the borrowed funds by diverting them from the bank's credit to his individual uses. There was in fact no wrongful misappropriation of the note, even if the precise mode of its use was not that contemplated. A fraudulent perversion of the original object and design of negotiable paper is necessary to constitute a misappropriation. "If the note has effected the substantial purpose for which it was designed by the parties, an accommodation indorser cannot object that the accommodation was not effected in the precise manner contemplated, where there is no fraud, and the interest of the indorser is

not prejudiced." (*Duncan, Sherman & Co.* v. *Gilbert*, 29 N. J. Law 521; Daniel on Negotiable Instruments, Section 792.)

Respondents were not prejudiced by any act of this appellant, who took the note in perfect good faith, and without any reason at all to suspect that there were limitations upon its use. Indeed, there were none, except that the paper was for the purpose of raising money in Chicago for the use of the Great Falls bank. The Chicago bank ought not now to be held responsible for Hanks' misuse of the proceeds of the note. Respondents had confidence in Hanks, and gave him the note for a specific purpose, and now that he has defrauded them after effecting that purpose, by diverting the sum realized on the note, they, and not plaintiff, must suffer. (*Evans et al.* v. *Title Hardware Co.* (Ark.) 45 S. W. 370.)

Believing, therefore, that there was no wrongful diversion of the note, as contradistinguished from the proceeds thereof, as between the plaintiff bank and the makers of the note, common principles lead to the conclusion that the makers, and not an innocent holder, should be responsible for the personal confidence which they reposed in Hanks. The usages of commercial paper do not require banks, in their ordinary business affairs, to ascertain whether negotiable paper, apparently regular on its face and offered for discount, is or is not subject to a reserved agreement to which the bank is not privy, and of which it knows positively nothing, and of the possible existence of which the paper contains no information..

But assuming, without conceding, that there was a wrongful diversion of the note by Hanks from the special purpose for which the note was made and intrusted to him, we fail to see how respondents can escape liability. Plaintiff bank, having proved that it had no knowledge or notice of the fact that Hanks was guilty of a fraudulent diversion of the note, and having parted with something of value for it when it loaned the money to Hanks, as the holder of negotiable paper, received in good faith before maturity, without notice, and in the absence of a circumstance tending to show fraud in the di-

version of the note, will be protected. An inspection of the note itself gave no notice to plaintiff of any agreement, condition or restriction between the respondents and Hanks, under which it was intrusted to Hanks. As we have seen, the fact that it was made to the order of the plaintiff bank was not sufficient to put plaintiff upon inquiry. Negotiable paper differs from ordinary contracts in writing in this essential way: A holder of a negotiable promissory note, even though he be a wrongful holder, or one between whom and the maker or indorser of the note the note would not be good, may transfer the paper to an innocent person, who, if he takes in good faith, without notice and for value, has a good title as against the maker or indorser. (Norton on Bills and Notes, page 12; *Burson* v. *Huntington*, 21 Mich. 430.)

The case of *Farmers' & Mechanics' Bank* v. *Hathaway*, 36 Vt. 539, cited by respondents, was entirely different on its facts. It involved a note not negotiable on its face, and transferred to the indorser with notice that the payee refused to negotiate the note. A later Vermont case in point, however, is that of *Quinn* v. *Hard*, 43 Vt. 375, wherein the court distinguished the *Mechanics' Bank Case*, *supra*, and emphasized the fact that in that case the note was not negotiable, and did not import that it was primarily designed to be delivered to the indorser, who was not the payee named in the note. The court decided that an accommodation maker or surety, by signing and intrusting a note with the maker to be delivered, gave to the maker an apparent authority to use the note for the purpose to which it was applied, and that plaintiff in that case was justified in accepting it, as he did, upon the faith that Lane, the maker, had such authority from the surety. Here Hanks not only had apparent authority to negotiate the note, but he had actual authority to do so, although we are assuming his actual authority was to negotiate it in a manner and for a purpose different from those pursued.

Respondents, by their authorization to Hanks to negotiate the note, created the relation by means of which Hanks' wrong was committed. They deliberately gave the appear-

ance and the reality of validity to the note. "The balance of equity," upon the assumed facts as well as upon the true ones, is in favor of the plaintiff, the *bona fide* holder for value and without notice. (*Am. Ex. National Bank* v. *N. Y. B. & P. Co.*, 148 N. Y. 698, 43 N. E. 168.)

These views dispose of the case. They apply to the note in suit as well as to preceding ones. The district court erred in giving the several instructions to the jury which embodied contrary rules. The judgment is reversed, and the cause remanded, with directions to grant a new trial.

Reversed and remanded.

PEMBERTON, C. J. concurs. PIGOTT, J. disqualified.

STATE OF MONTANA, EX REL. GEORGE DILDINE, RELATOR, v. TIMOTHY E. COLLINS, STATE TREASURER.

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[Decided August 2, 1898.]

States—Claims—Approval by Board of Examiners—University Bond Fund.

Laws of 1897, page 58, provides for the issuance of bonds to create a fund for the erection of state university buildings, and creates a building commission, who have authority to draw their warrants on the state treasurer for sums due any building contractor, and the state treasurer is required to pay them out of said fund. *Held*, that a warrant drawn by the commission in favor of a contractor need not be passed on by the state board of examiners created by the Constitution, Art. 7, Sec. 20, which provides that no claims against the state shall be passed on by the legislature without first having been approved by the board, since the university bond fund is a trust fund entirely different from one arising from taxation, and is not a state fund over which the board of examiners would have control.

APPLICATION by the state, on the relation of George Dildine, for a writ of mandamus to compel Timothy E. Collins, state treasurer, to pay a certain warrant drawn by the building commission of the state university. Writ granted.

Statement of the case by the justice delivering the opinion.

The petitioner sets forth that a building commission was created pursuant to the provisions of "An act to provide for the erection, completion, furnishing and equipment of buildings for the University of Montana," and that said commission was duly organized; that bonds were issued to the amount of $100,000, secured by the pledge of the lands granted to the state of Montana for university purposes, and that these bonds were sold, and the proceeds arising therefrom were placed in the hands of the treasurer of the state of Montana, as a special fund (Session Laws 1897, page 58); that the commission entered into a contract for the erection, completion and equipment of the buildings, and that a contract was entered into with the petitioner for the construction and completion of two buildings for university purposes; that this contract provided that at least every two weeks the architect should make an estimate of the amount of work done on the buildings, and the amount of materials furnished, and that upon such estimate the building commission should draw its warrant on the state treasurer against said fund; that on the 20th day of April, 1898, the architect made a correct estimate of work and materials furnished, and returned said estimate to the building commission, and the estimate so returned was approved and allowed, and a warrant drawn for 80 per cent. thereof, to wit, $2,817.60; that this warrant was signed by Alfred Cave, as vice president of the commission, and attested by Joseph K. Wood, secretary, and was presented to the respondent for payment, but that the respondent refused to pay the same, and still refuses; and that a writ of mandate should issue, requiring him to pay this warrant. A general demurrer is interposed to this petition for the reason that the petition does not state facts to entitle the petitioner to the issuance of a writ of mandate.

Congress, by an act approved February 18, 1881, granted lands to the territories of Dakota, Montana, Arizona, Idaho and Wyoming for university purposes. The act in question is as follows: "Be it enacted by the senate and house of representatives of the United States of America, in congress as-

sembled, that there be, and are hereby, granted to the territories of Dakota, Montana, Arizona, Idaho and Wyoming, respectively, seventy-two entire sections of the unappropriated public lands within each of said territories, to be immediately selected and withdrawn from sale and located under the direction of the secretary of the interior, and with the approval of the president of the United States, for the use and support of a university in each of said territories when they shall be admitted as states into the Union: provided, that none of said lands shall be sold except at public auction, and after appraisement by a board of commissioners to be appointed by the secretary of the interior; provided further, that none of said lands shall be sold at less than the appraised value, and in no case at less than two dollars and fifty cents per acre: provided, that the funds derived from the sale of said lands shall be invested in bonds of the United States and deposited with the treasurer of the United States; that no more than one-tenth of said lands shall be offered for sale in any one year; that the money derived from the sale of said lands invested and deposited as hereinbefore set forth, shall constitute a university fund; that no part of said fund shall be expended for university buildings, or the salary of professors or teachers, until the same shall amount to fifty thousand dollars, and then only shall the interest on such fund be used for either of the foregoing purposes until the said fund shall amount to one hundred thousand dollars, when any excess, and the interest thereof, may be used for the proper establishment and support, respectively, of said university."

Section 14 of the enabling act of 1889 reads as follows: "That the lands granted to the territories of Dakota and Montana by the act of February 18th, eighteen hundred and eighty-one, entitled 'An act to grant lands to Dakota, Montana, Arizona, Idaho and Wyoming for university purposes,' are hereby vested in the states of South Dakota, North Dakota and Montana, respectively, if such states are admitted into the Union, as provided in this act, to the extent of the full quantity of seventy-two sections to each of said states, and any

portion of said lands that may not have been selected by either of said territories of Dakota and Montana may be selected by the respective states aforesaid; but said act of February 18th, eighteen hundred and eighty-one, shall be so amended as to provide that none of said lands shall be sold for less than ten dollars per acre, and the proceeds shall constitute a permanent fund to be safely invested and held by said states severally, and the income thereof be used exclusively for university purposes. The schools, colleges and universities provided for in this act shall forever remain under the exclusive control of the said states, respectively."

The legislative assembly of this state, by an act approved March 4, 1897, provided for the issuance of bonds to the amount of $100,000 for the erection, completion, furnishing and equipment of buildings for the University of Montana; and section 3 of the act provided that all funds realized from the sales of licenses to cut trees, leasing of lands, or from the profits arising from the permanent fund to be created as provided for by section 14 of an act of congress (above referred to), and by the enabling act, are pledged as security for the payment of the principal and interest of the bonds issued, and all revenue or profits derived from the lands or permanent fund should constitute a fund for the payment of the principal and interest of the bonds.

Section 4 provided that the state treasurer should keep the moneys in a separate fund, to be known as the "University Bond Fund," and out of this fund to pay, subject to the approval of the state board of examiners, the cost and expense of issuing the bonds, and the interest on the bonds when due; and the third subdivision of the section provides that when the bonds shall become payable they shall be called in, and that, in the event sufficient funds do not exist to pay the interest, the state board of examiners shall, by order, cause warrants to be issued on the university bond fund for the amount of interest due, and the warrants thus issued shall bear interest at the rate of 6 per cent. per annum.

Section 6 of the act provided that the moneys derived from

the sale of the bonds should be used to furnish, erect and equip the buildings for the use and benefit of the University of Montana, and should, by the state treasurer, be paid out on the warrants of the building commission of said university, as provided in section 7.

Section 7 is as follows: "There is hereby created a building commission to be composed of five persons to be appointed by the governor of the state, no more than two of whom shall be of the same political party, and all residents of the city of Missoula, who shall serve without compensation, whose duty it shall be to contract for the erection and furnishing of suitable buildings for the use and benefit of the University of Montana; the said commission shall have charge and supervision over the construction of said buildings and all things pertaining thereto; and shall have authority from time to time to draw their warrants on the treasurer of the state of Montana for such sum or sums as may be due any contractor or employee engaged in and about the erection of said buildings, which warrants shall be paid by the said state treasurer out of any funds in his hands arising from the sale of bonds provided for in this act. Said building commission is hereby authorized to employ an architect and such other assistants as it may deem necessary in preparing the plans, specifications and superintending the construction of said building, and the expense thereof shall be paid out of the funds as hereinbefore provided for the erection of said buildings, provided that all architects, superintendents and contractors shall be citizens of the state of Montana. Said commission shall make report from time to time to the stated meetings of the state board of education of the progress of said work and the expenditures therefor."

Section 8 reads thus: "The state of Montana shall in no wise be held liable for the payment of the bonds herein authorized or interest thereon."

Jos. K. Wood, for Relator.

C. B. Nolan, *Attorney General*, for Respondent.

HUNT, J.—The case submitted presents the question whether, under the act of the legislature (Session Laws 1897, page 58) referred to in the statement of facts, the claim for the warrant drawn in favor of the petitioner ought to have been passed upon by the state board of examiners before the state treasurer was authorized to pay it.

Section 20 of Article 7 of the Constitution is as follows: "The governor, secretary of state and attorney general shall constitute a board of state prison commissioners, which board shall have supervision of all matters connected with the state prisons as may be prescribed by law. They shall constitute a board of examiners, with power to examine all claims against the state, except salaries or compensation of officers fixed by law, and perform such other duties as may be prescribed by law. And no claims against the state, except for salaries and compensation of officers fixed by law, shall be passed upon by the legislative assembly without first having been considered and acted upon by said board."

The statute cited, providing for the erection, completion and equipment of buildings for the university of the state, was passed and approved after the decision of this court in *State v. Cook*, 17 Mont. 529, 43 Pac. 928. The legislature are therefore presumed to have acted with full knowledge of the interpretation placed upon a statute of similar import, and whereby the fund created by the sale of bonds secured by pledge of the lands donated to the state by act of congress approved February 22, 1889, entitled "An act to provide for the division of Dakota into two states, and to enable the people of North Dakota, South Dakota, Montana and Washington to form constitutions and state governments, and to be admitted into the Union on an equal footing with the original states and to make donations of public lands to such states," was held to be a trust fund established by law in pursuance of the act of congress, yet not to be a state fund, in the sense that moneys realized from taxes and in the public treasury are state funds. It was held that the state was to be regarded in the light of an agent for the execution of a trust. No state debt

is created, or can be created, under the law, and the people of the state contribute no money to the fund. It is really a donation by the federal government, and is upon a different footing, entirely, from funds arising by taxation, and out of which are built, for instance, reform schools, soldiers' homes, arsenals, penitentiaries and asylums, not included in the enabling act, all of which are state funds, to be disbursed as expenditures of the state, and which are brought fairly within the meaning of the constitutional limitations and restrictions. So that, upon reconsideration of the views expressed in the Cook case, we feel that they must stand as correct.

It is evident, furthermore, that the act of the legislature providing for the erection of the university buildings did not contemplate that claims arising under the term of the contracts for the buildings should be subject to examination or approval by the state board of examiners. Section 7, which created the building commission of five, made it the duty of such commission to contract for the erection and furnishing of suitable buildings, and gave the commission charge and supervision over the construction of such buildings and all things pertaining thereto, with authority from time to time to draw their warrants on the treasurer of the state for moneys due to the contractors or employees, "which warrants shall be paid by the said state treasurer out of any funds in his hands arising from the sale of bonds provided for in this act." In respect to such payments the commission draws its warrants directly, and the treasurer is obliged by law to pay it, without requiring, as a prerequisite to the right of payment, action by the state board of examiners. The purposes of this more direct procedure are not important to consider, but doubtless facility and expedition were considerations which led to the mode adopted. The legislature probably thought, too, that a building commission of five persons appointed by the governor, and residents of Missoula, where the buildings are being erected, who would be always on the ground, would be just as careful in making the donation thoroughly advantageous to the state, and just as vigilant in the execution of the details of

the trust, and as cautious in the allowance of claims, as would be the state board of examiners, sitting at the capital. As a check, too, it is provided that it shall report from time to time to the stated meetings of the state board of education of the progress of the work and the expenditures therefor.

Now, in the matter of certain other payments out of the bond fund, there is a requirement that claims therefor must first be approved by the state board of examiners. The expenses of issuing the bonds, the interest on the bonds, the payment of the bonds, and warrants for interest due, can only be paid after approval by the state board. Such is the explicit provision of the law. But those claims and payments are extraneous from the claims and payments arising and due in connection with the erection and furnishing of the buildings themselves, and are a separate part of the legislative scheme, providing (1) for the issuance and sale of bonds, and the subsequent payments of interest thereon; and (2) for the erection and furnishing of the buildings erected, out of funds realized from the sale of the bonds. Over the former, which will be a matter of fiscal regard for from 20 to 30 years, the state board has authority; but with the latter, which involves the execution of duties which may be ended within a comparatively few years, the board has nothing to do, either under the law or the constitution. It follows that relator's claim is not a claim against the state, and that the duty of the treasurer is to pay it. The demurrer is overruled. Let the writ issue as prayed for.

Writ granted.

PEMBERTON, C. J., absent. PIGOTT, J., concurs.

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JOHN MAXEY, RESPONDENT, v. WALTER COOPER, APPELLANT.

[Submitted Sept. 26, 1898. Decided Oct. 3, 1898.]

Appeal from Justices' Courts.

An appeal lies from a judgment entered in a Justice's Court upon failure of defendant to answer after the overruling of his demurrer to the complaint—the demurrer to the complaint raises a question of law, which is apparent upon the face of the papers. (Section 1761 Code of Civil Procedure.)

Appeal from District Court, Gallatin County; F. K. Armstrong, Judge.

ACTION by John Maxey against Walter Cooper. From a judgment dismissing his appeal from justice's court, defendant appeals. Reversed.

Campbell & Parr, for Appellant.

W. S. Holloway, for Respondent.

PIGOTT, J. Maxey filed with a justice of the peace his complaint, stating "that on the 1st day of June, 1897, the defendant Cooper, was indebted to the Gallatin Light, Power & Railway Company in the sum of $49.55;" that the company had assigned the claim to plaintiff, and that it was unpaid. Cooper demurred to the complaint for insufficiency. The justice overruled the demurrer, and required Cooper to answer within 24 hours. Thereafter the default of Cooper for want of an answer was entered, and judgment was thereupon rendered against him for the amount of the demand and for costs. From the judgment Cooper appealed to the district court, where Maxey moved a dismissal upon the ground that "said pretended appeal was taken, or attempted to be taken, from a judgment rendered by default in the said justice's court, and there are no question or questions of law appearing upon the face of the papers from which an appeal

could be taken, and said justice's court did not pass upon the question of setting aside any default of judgment. This motion is made upon the papers in the case." The motion was sustained, and judgment entered dismissing the appeal. That judgment is before us for review.

Conceding, but not deciding, that the judgment rendered by the justice is, as plaintiff insists, a judgment by default, within the meaning of Sections 1580, 1581, and 1761 of the Code of Civil Procedure, rather than a judgment by *nil dicit*, we are of the opinion that the action of the district court in dismissing the appeal therefrom was error. An appeal on questions of law which appear upon the face of the papers or proceedings lies from a judgment by default rendered in a justice's court, and, if such judgment be set aside, the district court must allow pleadings to be filed, and try the case. Section 1761, *supra*. In the justice's court the defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, whereupon arose an issue of law which was tried and determined by the justice. Whether well urged or not, the demurrer was not frivolous, and therefore a question of law was apparent upon the face of the papers. It would seem, moreover, that denial of an appeal on questions of law in such a case as the one at bar would violate the provisions of Section 23 of Article 8 of the Constitution of Montana, to the effect that in all cases appeals shall be allowed from a justice's court to the district court under such regulations as may be prescribed by law; but, however this may be, the statute expressly recognizes the right of appeal under the facts here presented. Nothing in *Gage* v. *Maryatt*, 9 Mont. 265, 23 Pac. 337, is opposed to the reasoning of, or the conclusion reached in, this opinion.

Let the judgment dismissing the appeal be reversed, and the cause be remanded, with direction to the district court to deny the motion and entertain the appeal; and it is so ordered.

Reversed and Remanded.

PEMBERTON, C. J., and HUNT, J., concur.

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A. GUITERMAN, ET AL., RESPONDENTS, *v.* W. S. WISHON, APPELLANT.

[Submitted Sept. 26, 1898. Decided Oct. 3, 1898.]

Statute of Limitation—Constitutionality of Change—Vested Rights—Pleading—Denial—Partnership—Name.

1. STATUTE OF LIMITATIONS—*Change—Vested Rights.*—The statute of limitations does not confer a vested right; and a law shortening the time within which an action upon an existing debt may be commenced is not unconstitutional, if a reasonable time for commencing an action thereon is provided.
2. The Code of Civil Procedure was adopted in February, 1895, but did not take effect until July 1, 1895. By section 514, the time within which an action upon an account shall be brought was changed from five to three years. By section 557 it is provided that the statute of limitations prescribed by the new code does not extend to actions already commenced, or to cases where the time prescribed in any existing statute for acquiring a right or barring a remedy has fully run. The plaintiff's right of action accrued, according to the issues, on July 28, 1893, and his action was not brought until Nov. 21, 1896. *Held*, that plaintiff had under the new law a reasonable time within which to bring his action; and, he having failed to do so, the action was barred by the statute.
3. The complaint alleged that part payment had been made upon a certain named day; the answer denied that, on that day or at any other time since the 28th day of July, 1893, (the date of the purchase) the defendant paid the sum mentioned in the complaint or any other amount whatever, and averred that plaintiff had received no sum whatever from the defendant for any purpose. *Held*, that the answer denied the allegation of payment on account contained in the complaint.
4. The plaintiffs, A. Guiterman, S. A. Guiterman and L. A. Guiterman, were doing business under the firm name of Guiterman Bros. *Held*, that this was not a fictitious name, or a designation not showing the persons interested as partners, within the meaning of Section 3280, Civil Code.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by A. Guiterman and others against W. S. Wishon on an account. Judgment for plaintiffs on demurrer to the answer, and defendant appeals. Reversed.

J. E. Healy, for Appellant.

John W. Kirk, for respondents.

HUNT, J.—Action by plaintiffs (respondents), who allege that they are co-partners, against defendant (appellant), for $398.89, balance due upon an account for goods sold during

the year 1893. The total value of goods so sold is alleged to be $429.39, of which sum appellant is alleged to have paid $30.50 on March 17, 1894. Complaint was filed Nov. 21, 1896. Defendant, in the following language, denied payment of $30.50 on March 17, 1894: "Denies that on the 17th day of March, 1894, or at any other time or times since the said 28th day of July, 1893, the defendant paid to the plaintiffs the sum of thirty and 50-100 dollars, or any other amount whatever; and avers that the plaintiffs have received no sum, whether thirty and 50-100 dollars or any other amount whatever, from the defendant, or any agent of the defendant, or any person in the employ, agency of, or control of, the defendant for any purpose whatever." Defendant also averred that the last item in the account between plaintiffs and defendant was dated July 28, 1893, and pleaded that he had made an assignment for the benefit of his creditors on August 21, 1893, and that under the statute of limitations (Sections 514, 519, 555, 557, 3456, Code of Civil Procedure) and by Section 9 of the Political Code, plaintiffs' cause of action was barred. The answer also alleged that since July 1, 1895, plaintiffs were doing business in Silver Bow county, Mont., under the fictitious name of Guiterman Bros., and that said name does not show the names of the parties constituting and being the parties interested in the co-partnership alleged, and that plaintiffs have not published any certificate showing the names of the parties interested in the said business and co-partnership, as required by law.

Respondents' general demurrer to the answer was sustained, and from a judgment in plaintiff's favor defendant appealed.

Reference to the foregoing statement shows the principal question for determination to be whether the statute of limitations was properly relied upon by defendant. When the account sued on was contracted, and up to July 1, 1895, when the codes took effect, the period prescribed for the commencement of action by plaintiffs was five years from the time of the last items proved by either side. (Session Laws 1889, p. 173.) The new Code of Civil Procedure, adopted February,

1895, and which took effect July 1, 1895, prescribed three years as the limitation, instead of five, as theretofore. It was also provided by Section 3456 of the Code of Civil Procedure that: "When a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy, or for any other purpose, has begun to run before this code goes into effect, and the same or any limitation is prescribed in this code, the time which has already run shall be deemed part of the time prescribed as such limitation by this code."

Section 3483 of the same code specifically repealed the before mentioned act of 1889, subject, however, to the provisions of sections 3482, 3455 and 3456 of the code. Section 3482 was also a repealing statute, but expressly did not affect any right already existing or accrued, or any action or proceeding already taken, except as in the code provided; while section 3455 said that no action or proceeding commenced before the Code of Civil Procedure took effect, and no right accrued, should be affected by its provisions.

It was enacted by section 557 that the provisions concerning the time of commencing actions do not extend to actions already commenced, nor to cases where the time prescribed in any existing statute for acquiring a right or barring a remedy has fully run, but the laws in force immediately before the taking effect of the Code of Civil Procedure are applicable to such actions and cases, and were repealed, subject to the provisions of said section 557. The legislature, by adopting the codes, altered the period of time in which actions on accounts might be commenced by shortening it when the time prescribed in the compiled or other statutes existing before the codes took effect had not fully run. Where the time prescribed for acquiring such right or barring a remedy had fully run, the laws in force before the codes became operative apply.

Respondents rely upon the doctrine of vested rights, and cite language used by Chief Justice Wade in *Gillette* v. *Hibbard*, 3 Mont. 415, to the effect that when a cause of action

arises under a statute of limitations the act thereby becomes a rule of property, and the right to commence such action within the period of limitation cannot be restricted or taken away without impairing vested rights. But, whatever may have been said *obiter* in the learned judge's opinion in the case cited, the principle was distinctly stated that limitation acts affect the remedy, and not the right. And to this extent, at least, we affirm the decision. But that the right to the defense of the statute is a vested right, or a right of property, as we understand respondents contend for, is not correct. There is no property in the bar of an act of limitations by way of defense to defendant's promise to pay. In *Campbell* v. *Holt*, 115 U. S. 620, 6 Sup. Ct. 209, the United States Supreme Court decided that the defense of lapse of time to the obligation to pay money was no natural right, but the creation of conventional law. "We can understand," said the court, "a right to enforce the payment of a lawful debt. The constitution says that no state shall pass any law impairing this obligation. But we do not understand the right to satisfy that obligation by a protracted failure to pay. We can see no right which the promisor has in the law which permits him to plead lapse of time instead of payment, which shall prevent the legislature from repealing that law, because its effect is to make him fulfill his honest obligations." Statutes of limitation, being somewhat arbitrary in their nature, and founded in public needs and public policy, may shorten the periods in which actions shall be commenced, or may extend them, and yet not disturb vested rights, or rights of property. Such is the established rule of the federal courts since *Campbell* v. *Holt*, *supra*, decided long subsequent to *Gillette* v. *Hibbard*, *supra*, and upon this theory the codes of this state were adopted.

The qualification to the rule that statutes of limitation affecting existing rights are not beyond the legislative power, is that a reasonable time must be given for the institution of the action before the bar takes effect. (*Terry* v. *Anderson*, 95 U. S. 628.) Adequate means of enforcing the right be-

ing preserved, the question then is one of reasonableness; that is, was the time allowed by the new codes, in which the action could be commenced reasonable under the facts and circumstances? The Code of Civil Procedure was duly approved on February 14, 1895, and took effect July 1, 1895. The last item of account between the parties having been on July 28, 1893, plaintiffs, under any circumstances, had three years, or until July 28, 1896, to commence their action, but failed to do so until November 21st, or more than fifteen months after the Code of Civil Procedure went into effect, and over twenty months after it was passed and approved as the law. The time not yet elapsed in which they could have proceeded, and yet have been within a three-years' limitation, was so clearly reasonable to enable plaintiffs to enforce their demand that we must hold they were negligent in not pursuing the remedy afforded them. (*Dale et al.* v. *Frisbie et al.*, 59 Ind. 530; *Pereles* v. *Watertown*, 6 Biss. 81, Fed. Cas. No. 10,980; *Smith* v. *Packard*, 12 Wis. 413.)

There are are cases, notably *Ludwig* v. *Stewart*, 32 Mich. 27, and *Parsons* v. *Wayne Circuit Judge*, 37 Mich. 288, which hold that, where the legislature fixes no time for the commencement of suits before a right of action is barred, the determination of what is a reasonable time within which to bring suit is a matter of legislation, and not a judicial question.

It may be that notice of the act of 1895 was given by the passage of the code, February 14, 1895, as was held in *Smith* v. *Morrison*, 22 Pick. 430, and as intimated in *Holcombe* v. *Tracy*, 2 Minn. 241 (Gil. 201) and that the period between such date and July 1, 1895, was a reasonable time fixed by the legislature in which parties might commence suits upon existing causes of action before the statutory bar could be pleaded; or it may be that the passage of the law was not notice, but that, when it was decided to postpone the period for the statute to come into operation, the statute had no force until it became the operative law of the land, as was held in *Price* v. *Hopkin*, 13 Mich. 318. That question is reserved

as unnecessary to a decision herein, for, as the pleadings state the facts of this case, surely the plaintiffs cannot complain, inasmuch as the lapse of time even between the date of the taking effect of the code and three years after their cause of action accrued must be considered reasonable as a matter of law. To this conclusion we are impelled in an effort to give effect to the intent of the legislature. It is plain that plaintiffs' cause of action is not brought within either of the two instances provided for by Section 557, *supra*, of the new code. Therefore, as to it, the old statute was expressly repealed. This being so, there would be no limitation to an action on an open account, unless the new statute affected it. That no statute at all should apply would be contrary to the policy of legislation and to the evident intent of the lawmaking power of the state. We therefore believe the code does apply, and that three years was the time fixed as applicable to causes arising under the old law, and not yet barred when the code took effect. The former statute having commenced to run, the new law diminished the time, and, if the legislature has not directly specified what is a reasonable time to be allowed in which to bring suit, it devolves upon the court to apply the law so as not to deprive one of a reasonable time to sue on his demand, and to require that action be commenced within such reasonable time, or be barred. Believing this to be the only logical conclusion under the statutes and codes of the state bearing upon the question involved, we hold that plaintiffs' cause of action is barred by the lapse of the intervening time between July 1, 1895, and July 28, 1896.

Plaintiffs' point that defendant has not denied that payment was made on the account as alleged in the complaint is not well taken.

There is no merit in the contention of defendant that the firm name of Guiterman Bros. is a fictitious name, or a firm name not showing the names of the parties composing the partnership, and that plaintiffs cannot maintain this action because they have not filed with the clerk of Silver Bow county the certificate required by Section 3280, of the Civil Code.

The complaint shows that plaintiffs, A. Guiterman, S. A. Guiterman, and L. A. Guiterman, were co-partners doing business at St. Paul, Minn., under the firm name and style of Guiterman Bros. This was not a fictitious name at all, nor a designation not showing the names of the persons interested as partners in such business, within any reasonable meaning to be put upon Section 3280, *supra*. Section 3280 being exactly similar to the California statute upon the same subject, we adopt the reasoning and decisions of the supreme court of that state holding that a firm name showing the surnames is neither fictitious nor a designation not showing the names of the partners, within the purview of a statute like Section 3280. (*Pendleton et al.* v. *Cline*, (Cal.) 24 Pac. 659; *Carlock et al.* v. *Cagnacci*, (Cal.) 26 Pac. 597.)

The judgment is reversed, and the cause remanded, with directions to overrule the demurrer to the answer.

Reversed and Remanded.

PEMBERTON, C. J., and PIGOTT, J., concur.

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STATE OF MONTANA, EX REL. GUY STAPLETON, RELATOR, v. MELVIN L. WINES AND EDWIN S. BOOTH, RESPONDENTS.

[Decided Oct. 3, 1898.]

In proceedings for the disbarment of an attorney, the evidence to sustain the charges preferred should be of such a character that it satisfied the court to a reasonable certainty that the charges are true.

Petition by the state on the relation of Guy Stapleton, for disbarment, against Melvin L. Wines and Edwin S. Booth. Dismissed.

C. B. Nolan, for Relator.

Wm. Scallon, for Respondents.

PER CURIAM. In the above-entitled proceeding the county attorney of Silver Bow county charges Melvin L. Wines and

Edwin S. Booth, attorneys at law, with unprofessional conduct. The substance of the specific allegations is that they entered into a conspiracy with other persons to procure and have admitted in evidence in a criminal case pending in the district court of said county certain false and perjured testimony on the part of the defendant in said criminal case, they being at the time the counsel for said defendant. Upon the filing of the affidavit of the county attorney containing the charges of unprofessional conduct in this court, we appointed Hon. A. J. Campbell, one of the most prominent and respected members of the bar of the state, referee to take the testimony and report his findings of fact and conclusions of law in the case.

The report of the referee, now on file, after stating that he proceeded to the hearing in the case in the presence of Attorney General Nolan, Guy W. Stapleton, county attorney, representing the relator, and William Scallon, Esq., John W. Cotter, Esq., and Frank E. Corbett, Esq., for the respondents, is as follows: "The effect of the disbarment of attorneys practically means their complete ruin, and, before they should be disbarred, the evidence to sustain the charges should be of such a character that it satisfies the court to a reasonable certainty that the charges are true.

"Witnesses were produced, who testified that the respondents had committed the acts complained of. After observing their manner upon the witness stand, hearing their many contradictions, together with the fact that in some instances their evidence upon material points was shown to be untrue by the records in the case of the state against Shafer, and it appearing that the witnesses must have known such statements to be untrue when they were made, and their evidence upon other material matters being contradicted by reliable and credible witnesses, I am unable to believe their statements. I therefore find that the respondents did not commit the acts complained of in the petition, and recommend that the proceedings be dismissed."

The evidence taken in the case accompanies the report.

Counsel for Wines and Booth have filed their motion asking the court to adopt the findings and conclusions of the referee. The attorney general does not resist this motion, but admits that the findings of fact and recommendations of the referee are supported and authorized by the evidence. It is therefore conceded that the testimony of the witnesses supporting the charges is so unworthy of belief as not to authorize a judgment of disbarment in this case.

We agree with the referee as to the consequences of the disbarment of an attorney, as well as with the view that before a judgment of disbarment should be entered, "the evidence to sustain the charges should be of such a character that it satisfies the court to a reasonable certainty that the charges are true." In this case we feel no other disposition than to adopt the findings and recommendations of the referee, who has, in our judgment, so faithfully and ably performed the delicate duties of his office.

The findings and conclusions of the referee are adopted, and this proceeding is ordered dismissed.

Dismissed.

JAMES McDONEL and ano., Respondents, v. VALENTINE JACKY and ano., Appellants.

[Submitted Sept. 28, 1898. Decided Oct. 3, 1898.]

[For Syllabus see *State ex rel.* v. *Mayhew*, ante p. 93.]

Appeal from District Court, Granite County; Theodore Brantly, Judge.

Action by James McDonel and David W. Hennessy against

Valentine Jacky and Edgar I. Holland. From judgment for plaintiffs, defendants appeal. Reversed.

W. E. Moore, for Appellants.

C. B. Nolan, for Respondents.

PER CURIAM.—It is conceded that all the material facts and circumstances presented by the record in this case are precisely like those involved in *State* v. *Mayhew* (decided by this court April 18th last), 21 Mont. 93, 52 Pac. 981. Upon the authority of that case, the judgment appealed from in this case is reversed, and the cause remanded, with direction to the district court to render judgment in favor of appellants.

Reversed and remanded.

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

OCTOBER TERM, 1898.

PRESENT:

HON. WILLIAM Y. PEMBERTON, Chief Justice.

HON. WILLIAM H. HUNT, } Associate Justices.
HON. WILLIAM T. PIGOTT, }

STATE OF MONTANA, EX REL. AMOS BUCK, APPELLANT, *v.* THE BOARD OF COUNTY COMMISSIONERS OF RAVALLI COUNTY, RESPONDENT.

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21	486
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†22	244
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23	174
21	469
24	498
24	553

[Submitted Oct. 3, 1898. Decided Oct. 10, 1898.]

Certiorari—Interest of Applicant—County Commissioners—Exercise of Judicial Functions—Affidavit—Sufficiency.

1. Code of Civil Procedure Section 1942, providing that an application for a writ of *certiorari* must be made on affidavit by a party beneficially interested, does not require that affiant's interest shall be distinguishable from the mass of the community, when the matter sought to be reviewed affects the people generally, and the object of the writ is to inquire into the performance of a duty owing to the public.

2. Where a board of county commissioners, in pursuance of Political Code, Sections 4157, 4158, decides whether a petition presented to them for the submission of the removal of the county seat to the electors of the county is signed by a sufficient number to require them to submit the question to an election, it exercises judicial functions, within the meaning of the Code of Civil Procedure, Section 1941, providing that a writ of review may be granted when an inferior board, exercising judicial functions, has exceeded its jurisdiction.

3. An affidavit for a writ of *certiorari* to review a decision of county commissioners that a petition was signed by the required number of electors to justify their submitting the question of removing the county seat to an election stated that the board refused to receive evidence of the right of the persons signing the petition; that there was no evidence of the number of signatures required, nor of how many signers were qualified; but it was not stated that objection was made to the petition, nor that any evidence was offered, nor that the board was not advised of the number of signatures required. It also stated that before the petition was acted on the affiant's offer of evidence that a large number of signers was disqualified was rejected, but it did not indicate that, if the evidence was allowed, it would reduce the number qualified to less than was required, nor show that affiant objected to the petition while it was pending before the board, though he had opportunity to attack it. *Held*, the affidavit was insufficient where the petition bore the required number of names, and recited that the signers were qualified, since, in the absence of an objection and of fraud, which did not appear, it indicated that the board had regularly pursued its authority, and by Code of Civil Procedure, Section 1947, the review on such a writ was to determine whether they had or not.

Appeal from District Court, Ravalli County; Frank Woody, Judge.

Application by the state, on the relation of Amos Buck, against the board of county commissioners of Ravalli county, for a writ of *certiorari*. From a judgment quashing the writ, relator appeals. Affirmed.

H. C. Stiff, *L. J. Knapp* and *C. B. Calkins*, for Appellant.

C. B. Nolan, *R. Lee McCulloch* and *Robt. O'Hara*, for Respondent.

The plaintiff does not appear to be a party beneficially interested. The affidavit states, "that he is, and has been for more than one year last past, a resident taxpayer and qualified elector of the village of Stevensville, county of Ravalli and state of Montana; and as such is beneficially interested in the location of the county seat of said county." "The application must be made on affidavit by the party beneficially interested." Section 1942, Code of Civil Procedure. This necessarily means that in the appli-

cation made by a private party, his interest must be of a nature which is distinguishable from that of the mass of the community. (*Linden* v. *Alameda County*, 45 Cal. 7 (and cases cited); *Ashe* v. *Board of Supervisors*, 71 Cal. 237; *Parmenter* v. *Bourne*, 35 Pac. 590; *Marini* v. *Graham*, 67 Cal. 130; 4 Ency. Pl. and Pr. 172; *Conklin* v. *Fillmore County*, 13 Minn. 454.) Does it appear from the affidavit of plaintiff that his interest is distinguishable from that of any other resident of the county? The writ should have been addressed to the board instead of the members, as the proceeding contemplated by the code is a proceeding against a tribunal instead of the members composing it. (*Onesti* v. *Freelon*, 61 Cal. 627; *Frazer* v. *Freelon*, 53 Cal. 644; *State* v. *District Court*, 13 Mont. 422; 4 Ency. Pl. and Prac. 177.) It does not appear from the affidavits that the defendants exercised judicial functions, or if they did that they exceeded their jurisdiction in making the order. The board of county commissioners are not invested with judicial power. Citing Section 1941, Code of Civil Procedure; Section 1, Article 3, Constitution. "The judicial power in New Mexico, Utah, Washington, Colorado, Dakota, Montana and Wyoming shall be vested in a supreme court, district court and in justices of the peace." This has been construed to exclude county commissioners in the following cases: (*Hedges* v. *Commissioners*, 4 Mont. 291; *Rupert* v. *Board County Commissioners*, 2 Pac. 720 (Idaho); *Ferry et al.* v. *King County et al.*, 26 Pac. 538 (Wash.); *Rodgers* v. *Hayes et al.*, 32 Pac. 259 (Idaho); *Spencer* v. *County of Sully*, 33 N. W. 97 (Dakota.) The authorities all agree that the action to be reviewed by the writ must be judicial. (*In re* Saline County Subscription, 100 Am. Dec. 338 (45 Mo. 31); 4 Ency. Pl. and Pr. 76.)

PIGOTT, J. Buck applied to the court below for a writ of *certiorari* to the board of county commissioners of Ravalli county. The affidavit upon which the application was made states that Buck is a resident, taxpayer, and qualified elector of Stevensville, county of Ravalli, and as such is beneficially

interested in the location of the county seat of that county; that on March 9, 1898, a petition was presented to the board, asking that the county seat be changed from Stevensville to Hamilton, and that an election be ordered to determine whether such removal should be made; that on the filing of the petition the board made and caused to be entered in the journal an order that the question of the removal of the county seat as prayed for be submitted to the qualified electors of said county at the next general election, to be held in November, 1898; that at the last general election held in November, 1896, 1,875 votes were cast in Ravalli county; that the petition presented was not signed by a number of qualified electors of the county equal to one-half of the number of votes cast at the election of 1896, nor was it signed by a greater number of qualified electors than 700; that in acting on the petition and in making the order the board failed and refused to receive or consider any evidence showing or tending to show that the persons signing were or were not, electors; that in acting upon the petition and making the order the board had before it no evidence showing either the number of votes cast in the county at the last general election, or how many of the persons whose names were signed to the petition were electors of the county; that, before the petition was acted upon, Buck appeared before the board, "and offered to present evidence of the disqualification as electors of Ravalli county of a large number of the signers of said petition, which offer was by said board of commissioners then and there rejected;" and prays that a writ of *certiorari* issue. The writ was issued. Respondent board moved that it be quashed, for the reasons: First, that it does not appear that Buck is the party beneficially interested; secondly, that it does not appear that respondent exercised any judicial function in acting on the petition; thirdly, that it does not appear that respondent exceeded its jurisdiction in acting upon the petition; and, fourthly, that the affidavit does not state facts sufficient to justify the court in granting relief. Pending the motion, the affidavit was, by

order of the court, amended, by including therein the body of the petition asking for the removal of the county seat, as follows: "We, the undersigned, your petitioners, whose names are hereto following continuously in this bound book, beginning on page 1 thereof, who are residents and inhabitants of the county of Ravalli, in the state of Montana, and legal voters and qualified electors of said county of Ravalli, pray that the county seat" be removed from Stevensville to Hamilton, and that an election be held to determine whether such removal must be made. The motion to quash the writ was then granted, and judgment entered accordingly. From the judgment, Buck has appealed.

Respondent's brief fails to comply with subdivision 1 of rule 5 of this court (44 Pac. vii.). There is no excuse for its violation and we indulge the hope that counsel will hereafter observe its requirements.

1. The first ground of the motion to quash is that appellant is not a party beneficially interested, within the meaning of Section 1942 of the Code of Civil Procedure, providing that "The application (for the writ) must be made on affidavit by the party beneficially interested." Respondent insists that in an application for a writ of *certiorari* by a private person his interest must be of a nature which is distinguishable from that of the mass of the community; in other words, that the private person who invokes the writ must show some injury to himself not suffered by his fellows. The rule contended for is always observed in applications for the writ to enforce a private right, and in such case the applicant must disclose some personal or special interest in the matter sought to be reviewed; but where the relief sought is as to a subject of public concern, or is a matter of public right, the question whether the applicant is under the necessity of showing an interest peculiar to himself has been the occasion of irreconcilable conflict in the decisions of the courts.

After a painstaking and thorough examination of the cases treating of the question, we are satisfied that the great weight of authority and the better reasoning establish the rule that,

when the matter sought to be reviewed is one affecting the people generally, and the object of the writ is to inquire into the performance of a duty owing to the public, the applicant is not required to show any direct or special interest in the result, but that his interest as a citizen in having the laws duly executed and tribunals confined within their jurisdiction is sufficient. Moreover, in this state, the question may be deemed no longer open to controversy, for in *Chumasero* v. *Potts*, 2 Mont., at pages 255 and 277, the supreme court of the territory determined that any citizen of Montana may be the relator in an application for *mandamus* where the subject-matter concerns the validity of an election held to decide whether the territorial capital should be removed. That case, it is true, was *mandamus*, but the language of Section 1962 of the Code of Civil Procedure, as to the beneficial interest of the relator in *mandamus*, is identical with that of section 1942 of the same code, with respect to the interest of the applicant for the writ of *certiorari*, "and no reason is perceived why it has not the same meaning in both sections." (*Eby* v. *School Trustees*, 87 Cal. 166, 25 Pac. 240.) Counsel have dwelt at length upon the rule laid down in *Linden* v. *Alameda Co.*, 45 Cal. 7, as a direct and persuasive authority supporting the position of respondent. This case, however, is not only in conflict with *Chumasero* v. *Potts*, *supra*, and opposed by the current of modern opinions, but the principle there announced has been repudiated in *Eby* v. *School Trustees*, *supra*. In sections 229 and 230 of Merrill on Mandamus will be found a citation of numerous cases in which this question was determined.

2. In acting upon the petition, did respondent exercise judicial functions in the sense in which those words are used in Section 1941 of the Code of Civil Procedure? That section provides: "A writ of review may be granted * * * when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy."

Sections 4157 and 4158 of the Political Code are as follows: Section 4157: "Whenever the inhabitants of any county of this state desire to remove the county seat of the county from the place where it is fixed by law or otherwise, to another place, they may present a petition to the board of county commissioners of their county praying such removal, the place named in the petition, and that an election be held to determine whether or not such removal must be made." Section 4158: "If the petition is signed by qualified electors of the county, equal in number to at least a majority of all the votes cast in the county at the last preceding general election, the board must at the next general election of county officers submit the question of removal to the electors of the county."

We entertain no doubt that in determining how many electors signed the petition, and whether they were equal in number to a majority of all the votes cast at the election held in 1896, respondent exercised judicial functions, within the meaning of section 1941, *supra*. It exercised quasi judicial powers involving judgment and discretion. Among the many cases holding to this doctrine, we cite *Herrick* v. *Carpenter*, 54 Iowa 340, 6 N. W. 574; *Champion* v. *Board of Commissioners*, 5 Dak. 416, 41 N. W. 739; *Ellis* v. *Karl*, 7 Neb. 381; *State* v. *Commissioners*, 6 Nev. 100; *Board of Commissioners* v. *Markle*, 46 Ind. 96; *Miller* v. *Jones*, 80 Ala. 89. Our attention has not been called to, nor has a research disclosed, any decisions to the contrary.

3. The third ground of the motion is that it does not appear from the affidavit that respondent exceeded its jurisdiction in acting upon the petition, and the fourth ground is that the affidavit does not state facts sufficient to justify the court in granting relief.

Section 1947 provides: "The review upon this writ cannot be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer."

Sections 4157 and 4158, *supra*, clothe the board of commissioners with authority to receive petitions for the relocation of

county seats, and also incidentally, but nevertheless plainly and necessarily, to determine the question whether the petition so filed is signed by electors equal in number to a majority of all votes cast at the last preceding election. This question must be decided by the board, and the right to hear and determine this question is jurisdiction. The power to decide at all gives the power to decide wrong as well as right. (*Board of Commissioners* v. *Markle*, *supra*.) Respondent acquired jurisdiction by the filing of the petition, which, it is conceded, purported to be signed by the required number of electors; at least it is not claimed that the petition contained names less in number than a majority of the votes cast in 1896, nor that it did not contain names far exceeding such majority. Whether, in point of fact, it bore the signatures of that number, was a question for respondent to determine (7 Am. and Eng. Ency. Law, 1030), not arbitrarily, but upon evidence adduced before, or information otherwise possessed by, it. It may be admitted, for the purposes of this case, that if an elector (or, perhaps, a citizen not an elector) of the county makes seasonable, specific and definite objection, charging that the petition is not signed by the required number of electors, and tenders proof to establish the truth of his assertion, the duty of the board would be to hear the matter offered (*Crews* v. *Coffman*, 36 Neb. 824, 55 N. W. 265), and that the refusal under such circumstances to permit the remonstrant to make a showing would render the subsequent action of the board in ordering an election an excess of jurisdiction. Appellant contends that such is the condition presented here, but examination of the affidavit impels us to the contrary view. It states that the board refused to receive any evidence whatever as to the qualifications as electors of the persons signing the petition, and that there was before it, at the time of acting upon the petition and making the order, no evidence showing or tending to show either the number of votes cast in the county at the election of 1896, or how many of the signers were electors. It is not stated that any elector, or, indeed, any person, objected

to the petition for either of the reasons stated, or on any other ground, nor that any offer of evidence was made, nor that the board was not advised in respect of the number of votes cast at the last preceding election. The affidavit also alleges that, before the petition was acted upon, the appellant offered to present evidence to the effect that a large number of signers of the petition were not electors, but that respondent rejected the offer. If evidence had been adduced in accordance with the offer, there is nothing to indicate that the resulting proof would have reduced the number of electors to less than one-half of the votes cast in 1896. Appellant did not offer to prove that the signers who were not electors were sufficiently numerous to invalidate the petition. Although appellant had opportunity to attack it, analysis of the affidavit fails to disclose that any objection was made to the petition while it was pending before the board. (See *Ellis* v. *Karl*, *supra.*) The petition recites that each signer is a qualified elector of Ravalli county. The presentation of such a petition bearing the requisite number of names was, we think, in the absence of objection and of fraud, sufficient to warrant the board in ordering an election (*Crews* v. *Coffman*, *supra*), or at least sufficient to enable the court to say that the board regularly pursued its authority in the premises. Whether this action of respondent was founded upon strictly legal, sufficient, or the best evidence is not for the court to decide on *certiorari.* (*State* v. *Ellis*, 15 Mont. 224, 38 Pac. 1079; *Hetzel* v. *Board of Commissioners*, 8 Nev. 359; *State* v. *Board of Commissioners*, 6 Nev. 100. See, also, *Luce* v. *Fensler*, 85 Iowa, 596, 52 N. W. 517; *Currie* v. *Paulson*, 43 Minn. 411, 45 N. W. 854; *Smith* v. *Yoram*, 37 Iowa, 89; *Jackson* v. *People*, 9 Mich. 111.)

The affidavit does not state facts sufficient to show that the respondent has not regularly pursued its authority, and therefore the motion to quash was properly granted on the third and fourth grounds stated therein. It follows that the judgment appealed from must be affirmed, and it is so ordered.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

JOHN J. CAMBERS, APPELLANT, v. WILLIAM LOWRY ET AL., RESPONDENTS.

[Submitted Oct. 4, 1898. Decided Oct. 10, 1898.]

Contracts—Interpretation of Technical Words—Mining Lease —Injunction.

1. Under Section 2210 of the Civil Code, which provides that technical words in a contract are to be interpreted as usually understood by persons in the profession or business to which they relate, witnesses who are qualified may testify as to the meaning of the following words in a mining lease, "there shall be no ores stoped, except at the 300 foot level, and all ores shall be extracted from the drifts, raises or winzes." The decision of the lower court granting or refusing a preliminary injunction is a matter of discretion, and the order of the court below will not be reversed when the right to the injunction depends upon technical terms in a contract concerning the meaning of which the evidence is conflicting.

Appeal from District Court, Silver Bow County.

Bill by John J. Cambers against William Lowry and others. From an order denying a temporary injunction, plaintiff appeals. Affirmed.

Statement of the case by the justice delivering the opinion.

Plaintiff, Cambers, sued defendant Lowry and others for damages for the breach of the conditions of a certain mining lease, and for an injunction enjoining defendants from working and mining the premises involved pending the suit. Upon hearing on an order to show cause, the district court refused to issue the injunction prayed for, and dissolved the temporary restraining order theretofore issued. The plaintiff appeals from the order refusing to grant an injunction pending the action, and dissolving said temporary restraining order.

The lease and agreement between the parties in interest contains certain agreements on the part of the defendants in relation to cross-cuts in the mine, timbering and lagging of the drifts and cross-cuts, raises, winzes, and stopes. It also contains the following clause: "It is hereby expressly agreed

that there shall be no ores stoped, except at the three hundred foot level, and all ores extracted shall be extracted from the drifts, raises, or winzes."

Among other allegations in the complaint, it is alleged that in extracting ores from the drifts, winzes, stopes, and other workings, the defendants have gone outside the same, contrary to the covenants of the lease, and have failed to timber or lag said outside portions; that the winze sunk by the defendants from the two hundred foot level is over ten feet wide, etc., and that defendants are stoping valuable ores from said mine at a point between the two hundred and three hundred foot levels, at points near said two hundred foot level, and between the drift about forty-six feet below the two hundred foot level, said stoping all being between said drift and said two hundred foot level, there having been and being no stoping whatever below said drift, and no stoping having been done at said three hundred foot level, and that defendants have extracted ores from the mine, other than from said drifts, raises and winzes, in violation of the covenants of the lease; that defendants, in violation of the covenants requiring all ores to be extracted from the drifts, raises, and winzes, are extracting ores outside and beyond said drifts raises, and winzes, to the injury of the value of the mine; that defendants intend to extract all of the ores between said two hundred and three hundred foot levels, and other parts of the mine outside of the workings within which they should have been confined; and that defendants, in violation of the terms of the lease, ran a winze from the two hundred foot level to a depth of fifty or sixty feet, and at the bottom of the winze made a level, and stoped ore from the back of the level.

L. J. Hamilton, *Francis Brooks*, and *B. S. Shuster*, for Appellant.

Clayberg, Corbett & Gunn, *J. B. Welcome*, and *H. Lowndes Maury*, for Respondents.

HUNT, J. If the terms of the lease confined the defendants in the extraction of ore, literally to the three hundred foot

level, plaintiff was entitled to the injunction order prayed for: but if it was the intent of the parties to the lease that defendants could stope above the three hundred foot level, and below the two hundred, the district court properly denied the injunction. We so state the proposition involved, because the real contention between the parties confessedly arises over that clause in the lease which forbids stoping "except at the three hundred foot level," and which requires all ores to be extracted "from the drifts, raises, and winzes," and because it appeared in the evidence heard that the stoping done by defendants was confined to the bottom of the winze, some fifty feet below the two hundred foot level.

The lease contains numerous mining terms,—for instance, "lagging," "stopes," "raises," "winzes," "drifts," "levels," and others,—the significations of which, as used between mining men, are peculiar, and are so understood between them in their mutual agreements concerning mining properties, but which are not wholly clear to those unfamiliar with their meaning with relation to the particular subject-matter of mines. The learned judge who heard the testimony in the court below evidently believed that the case was one where evidence was properly admissible to interpret the technical terms used according to the usual understanding of miners and others engaged in the business of mining, and under Sections 2209 and 2210 of the Civil Code, and by the authority of this court in *Newell* v. *Nicholson*, 17 Mont. 389, permitted qualified witnesses to testify in explanation of the words used in that clause of the lease over which the controversy arose. We affirm the ruling admitting such testimony as sanctioned not only by our own court in the case cited, but by the very high authority of Lord Chief Justice Denman in *Clayton* v. *Gregson*, 5 Adol. & E. 302, where evidence was allowed to show the understanding among coal miners of the term "level" as used in a lease of a coal mine. Just what was meant, therefore, by the expression "stoping at the three hundred foot level," and what was the "three hundred foot level" of the mine, and to what level ore between the two

hundred and three hundred foot levels belonged, in the usage and custom of working mines, and whether or not ore taken by stoping from the bottom of a winze sunk from the two hundred foot level was "three hundred foot ore" or not, were questions to be correctly answered after hearing parol evidence of the sense in which they are usually received when used by persons when engaged in mining.

From the record before us it appeared in evidence that "everything above the three hundred and below the two hundred level" is called the "three hundred foot level;" that, "if a man wanted to go to the three hundred foot level of a mine, * * * he would stay right on the level," but, if told to "stope at the three hundred foot level" he would be expected to go "to any point between the two hundred and three hundred [levels],—it might be five feet below two hundred, and the ore would be carried to the three hundred foot level;" and that ore between the two hundred and three hundred levels, although "all tributary to the three hundred foot level. * * * is not always taken out at the three hundred foot level." From evidence of this character, the court, to give practical effect to the lease, rather than an effect which would confine defendants, in the extraction of ore, to the three hundred foot level alone, by which interpretation defendants would substantially be denied the right to extract any ore from the mine, concluded that the intent of the language used was that the lessee "be restricted to the stoping of ores above the three hundred foot level and below the two hundred." "It matters not," added the judge in his memorandum opinion, "that they commenced to work and extract ores between the two levels referred to. If they had started at the three hundred, and stoped up to the point where they were working when temporarily restrained, there would have been no controversy, and there is now no just cause for complaint."

There were conflicts in the evidence as to the meaning of the terms of the lease above discussed; plaintiff's witnesses testifying that, under the provision of this lease above re-

ferred to, stoping would begin at the "back" of the three hundred foot level, and that ore would be taken down to and through the three hundred foot level of the mine; and there were conflicts likewise as to timbering of the mine, but they, like the others, were resolved in defendants' favor.

Under the firmly established rule of this court, following recognized principles of law, the granting or refusing to grant preliminary injunctions is so largely a matter of discretion in the district courts that the supreme court will be very slow to interfere with the exercise of that discretion. We find nothing in this case to warrant a departure from that rule, and the order of the district court cannot be disturbed.

Affirmed.

PEMBERTON, C. J., and PIGOTT, J., concur.

21 482
23 293

HENRY BUCK, APPELLANT, v. JAMES T. FITZGERALD, AS COUNTY CLERK, ETC., RESPONDENT.

[Submitted October 11, 1898. Decided October 12, 1898.]

Application to Enjoin Public Act—Interest of Applicant—Pleading—Sufficiency—Assignment of Error.

1. In an application to enjoin a public officer from performing an official act affecting the people generally, the applicant need not show any special interest in the result.
2. In an action brought to restrain the county clerk from so preparing the official ballots for an election as to include therein the question of the removal of a county seat, the complaint alleged that the persons who made the order under which the clerk was about to act were not the officers authorized so to do, and that in making the order they acted without the proper and necessary evidence before them. *Held*, that the allegations in the complaint are not inconsistent, and that the complaint is not ambiguous, unintelligible or uncertain.
3. A complaint in an action brought to restrain the execution of an order of county commissioners directing that the question of the removal of the county seat should be submitted to the electors, alleged that the commissioners refused to receive evidence as to the qualification of the signers of the petition on which the order was based, although proof was offered to show that a large number of the signers were not qualified. *Held*, that the allegation is insufficient in that it does not state that the evidence offered would prove or tend to show that the petition was not signed by the requisite number of electors.
4. In an action brought to restrain a county clerk from so preparing election ballots as to include therein the question of the removal of the county seat, the complaint al-

leged that the three persons who made the order directing the clerk so to do were not county commissioners (the officials authorized to make such order), and had no right or claim to act as such, but that there were three other persons who held the office, and had duly qualified and assumed the duties thereof. *Held*, that the complaint stated facts sufficient to show that the order was made by those who were neither *de facto* nor *de jure* commissioners.

5. The objections and exceptions taken by the respondent cannot be assigned as error.

Appeal from District Court, Ravalli County; Frank Woody, Judge.

APPLICATION for an injunction by Henry Buck against James T. Fitzgerald, as county clerk, etc. From an order refusing the same, the plaintiff appeals. Reversed.

H. C. Stiff, C. B. Calkins and *L. J. Knapp*, for Appellant.

C. B. Nolan, R. A. O'Hara and *R. Lee McCulloch*, for Respondent.

PER CURIAM.—This is an appeal from an order refusing an application for an injunction to restrain the county clerk of Ravalli county from so preparing the official ballot for the election of November 8, 1898, as to include therein the question of the removal of the county seat from Stevensville to Hamilton. The complaint was attacked by demurrer. The demurrer was sustained, and the injunction refused. The case was submitted on yesterday, and to preserve the rights of the parties immediate decision is necessary.

1. The defendant assails the complaint upon the ground that it does not show that the plaintiff is a person whose interests are distinguishable from those of the mass of the residents of Ravalli county, and that, therefore, he has no standing as the real party in interest. But the allegations of the complaint in respect of the interest of the plaintiff are similar to those made by the applicant for the writ of *certiorari* in *State ex rel. Amos Buck* v. *Board of Commissioners of Ravalli Co.* (decided by this court Oct. 10, 1898) ante p. 469, 54 Pac. 939. We are of the opinion that the principle there announced is applicable here. For the reasons there given, we hold the complaint sufficient in that regard.

2. After stating facts showing the interest of plaintiff, the complaint alleges, in substance, that one Watts, one Lucas and one Williams, assuming to act as the board of commissioners of Ravalli county, had presented to them a petition signed by numerous persons representing themselves to be electors of Ravalli county, asking that the county seat be changed from Stevensville to Hamilton, and that an election be held to determine whether such removal should be made; that neither Watts, Lucas nor Williams was then a commissioner, or had any legal or just claim to act, or attempt to act, in the capacity of county commissioner, and had no right or authority to perform any act as such; that three other persons were then and there the county commissioners, and had duly qualified as such, and had assumed the duties thereof; that Watts, Lucas and Williams failed and refused to receive or consider any evidence tending to show the qualifications of any of the persons who had signed the petition as electors, although at the time it was presented and considered resident taxpaying electors of the county asked to be allowed to introduce proof to show that a large number, to wit, about 300, of the persons signing were not electors; that they did not have before them, nor did they consider, while entertaining the petition and making the order hereinafter mentioned, any evidence as to the number of votes cast at the election held in November, 1896, but based their action solely upon the petition; that at the election of November, 1896, 1,875 votes were cast in the county, and that the petition so presented was not signed by electors of the county equal in number to one-half of the votes cast at that election, nor was the petition signed by more than 700 electors, and that about 35 persons who had signed the petition caused to be presented with the petition a notice of their withdrawal from it; that Watts, Lucas and Williams thereupon made a pretended order, and caused the same to be entered in the journal kept for the purpose of recording the proceedings of the board of commissioners, to the effect that the question of the removal of the county seat as prayed for in the petition be submitted to the

electors of the county on November 8, 1898; that such pretended order was therefore utterly void, though fair upon its face; and that by virtue of such order the defendant will so prepare the official ballot as to submit to the electors the question of removing the county seat. These allegations are said to be ambiguous, unintelligible and uncertain, in that it does not appear therefrom whether the injury threatened arises from the fact that Watts, Lucas and Williams were illegally in office as commissioners, or from an illegal act performed by them while constituting the board of commissioners, or from an illegal act threatened to be performed by the defendant. Succinctly stated, the defendant's position is that it cannot be determined from the complaint whether plaintiff intends to rely upon the fact that Watts, Lucas and Williams were neither *de jure* nor *de facto* commissioners, or upon the fact that, as officers *de facto*, they wrongfully made the order complained of. He urges that the latter position is inconsistent with the former, and that the two cannot stand together. The complaint in this respect is not subject to the objections specifically urged. Allegations that the order was not made by the board of commissioners, and that the persons who made the order acted without evidence other than the petition, which is alleged to be signed by less than the requisite number of electors, are not inconsistent the one with the other, nor do they render the complaint ambiguous, unintelligible and uncertain. If the order was not the act of the board of commissioners *de jure* or *de facto*, it was void; if, in the opinion of the plaintiff, it was for the other reason likewise of no effect, the statement of the facts upon which that reason is based does not inject the element of uncertainty or ambiguity into the averments, nor render them unintelligible; and this is manifest whether the statement of facts be sufficient or not to show the defect in or nullity of the order.

3. One of the grounds of demurrer is that the complaint fails to state facts sufficient to constitute a cause of action. The averments of the complaint as to the making of the order

without evidence other than the petition, and the refusal to permit proof to show that about 300 of the signers were not electors, are, in substance and effect, the same as those considered in *State ex rel. Buck* v. *Board of Commissioners of Ravalli Co. supra.* In the present case, as in that, the evidence offered is not alleged to have been of such a character as would prove or tend to show that the petition was not signed by electors equal in number to one-half of the votes cast in 1896. Following the rule of that case, we must hold that these allegations are insufficient.

The charge that the persons making the supposed order were not commissioners *de jure* is directly made, and, while it must be conceded that the acts of *de facto* officers are valid, and that persons holding over after their terms, and publicly continuing to exercise the duties and functions of their former positions, are officers *de facto*, we think the allegations of the complaint, reasonably interpreted, are to the effect that Watts, Lucas and Williams were mere usurpers. The facts stated fairly import that the order was made by men who were neither *de jure* nor *de facto* commissioners, and hence that the order was not the act of the board of commissioners, in which alone is lodged the power attempted to be exercised by Watts and his two associates. If it be proved that they were not commissioners *de facto* or *de jure* at the time, the order is, of course, void.

4. The defendant complains of the action of the court in permitting plaintiff to amend the title of the action by substituting "James T. Fitzgerald, as county clerk and recorder," for "James T. Fitzgerald." Objections made and exceptions taken in the court below by the respondent may not properly be assigned as errors here. Furthermore, the transcript does not sustain the assertion of the defendant, since it fails to disclose the title of the cause prior to the amendment.

The order appealed from is reversed, and the cause remanded for further proceedings not inconsistent with this opinion. Let *remittitur* issue forthwith.

Reversed and remanded.

GREAT FALLS WATER WORKS COMPANY, Respondent, *v.* THE GREAT NORTHERN RAILWAY COMPANY and others, Appellants.

[Submitted April 4, 1898. Decided Oct. 17, 1898.]

Easements—Right of Way—Substitution—Parol Grant—License—Adverse Possession.

1. Easements—*Right of Way—Substitution.*—A right of way for a water main was given by deed containing a description of the route to be taken; subsequently the grantee sought to obtain a change in the route so that it might correspond to that contained in the deed previously drawn. This request was refused and had been refused before the delivery of the deed referred to; the president of the corporation grantor afterwards orally authorized the grantee to lay its water main along the line described in the rejected deed; the testimony did not show that the easement granted was abandoned, or that the right of way sought should be given and accepted in lieu of the one granted: *Held*, that the evidence would not sustain a finding of an agreement for the substitution of one right of way for the other.
2. Easement—*Parol Grant.*—An easement is an interest in land and cannot be created or granted except by deed or prescription.
3. License.—A license to lay a water main over or through land may be given by parol,—as no interest in the land is given; but the license may be revoked at any time, even after it has been executed and money expended in reliance thereon,—the licensee, however, has a reasonable time after notice of revocation, within which to remove his property.
4. License—*Adverse Possession.*—A license cannot ripen into an easement, as there cannot be an adverse possession by one in possession under a license.
5. License—*Creation—Agency—Estoppel.*—Plaintiff applied to the superintendent of defendant's grantor for permission to lay a water main over the premises subsequently conveyed; he referred plaintiff to his superior officers, by whom the right was refused; plaintiff, however, laid its main, and thereafter defendant purchased the property: *Held*, that no easement had been created, and defendant was not estopped to deny that no easement had been granted.
6. Under a deed of a right to lay a water main from a pumping station, and "after crossing [a certain railroad branch], along the southerly line of the right of way of the said branch to Tenth avenue," the main should intersect the branch at the nearest point thereon from the pumping station.

Appeal from District Court, Cascade County; J. Leslie, Judge.

Injunction by the Great Falls Water Works Company against the Great Northern Railway Company and others. From a judgment for plaintiff, defendants appeal. Reversed.

Statement of the case by the justice delivering the opinion.

Complaint for injunction to restrain defendants (appellants), which are railroad corporations operating railroads at Great Falls, from tearing up certain water mains laid by plaintiff (respondent) from its pumping station on the Missouri river to connect with its general water system at the city of Great Falls. Plaintiff owns a franchise to maintain and operate a water works system at Great Falls, with privilege of laying mains in the streets and alleys of said city, which system was in operation in January, 1896, when this action was commenced. On March 31, 1889, plaintiff purchased from the Great Falls Water Power & Townsite Company, hereafter called the "Townsite Company," certain realty then owned by the townsite company. Conveyance of this property was by deed in writing, and, in addition the grant of the parcel for a pumping station, the deed contains a grant as follows: "And the right of way necessary to lay water mains is hereby granted to said second party, its successors and assigns, but the same shall be laid, after crossing the Sand Coulee Branch of the Montana Central Railway Company, along the southerly line of the right of way of the said branch to Tenth avenue south, in the city of Great Falls, and from the point where the same intersects said Tenth avenue south the said mains shall be laid in the said streets and alley ways of said city." Plaintiff built its pumping station on part of the realty so purchased, and laid mains to connect therewith. After the delivery of the deed above referred to, plaintiff contends that the line of right of way "was changed and modified by mutual consent and agreement of the townsite company and the water company so that the same should be in a practically straight line from the said pumping station * * * to the western terminus of Ninth avenue south, in said city, as then platted; that said line of right of way for the laying of water mains was then and there, by the consent and agreement of the said townsite company and said water company duly substituted for and in place of the said right of way for said mains as described in said deed, and it was understood and agreed that said right of way for mains so substituted

should be and become a right of way for any and all water mains which might become necessary to lay from said pumping station to said city in the proper carrying out of the terms and conditions of said ordinance, and furnish said city and its inhabitants with water; that in pursuance of said consent and agreement and change and modification of said right of way for water mains the said water company immediately entered upon said right of way so agreed upon, and did construct and lay a certain water main from said pumping station to the western terminus of Ninth avenue south in practically a straight line; that said main was laid with the full concurrence and consent of the said townsite company and said water company, and that the same has ever since been maintained by said water company and its successors in interest over said right of way without objection, let, or hindrance from any person or persons, corporation or corporations; that the plaintiff and its predecessors in interest have maintained and operated, held and owned, continuously, openly, notoriously, and under a claim of right, since August, 1889, to the present time, the said right of way as agreed upon in substitution for the right of way described in said deed."

When the franchise was granted, and the aforesaid deed was delivered, and the alleged substitution of right of way was made, and until August, 1890, the townsite company owned all the ground involved herein; but on August 15, 1890, it conveyed to the St. Paul, Minneapolis & Manitoba Railway Company certain lots, numbered 1 and 8, excepting therefrom so much of the said premises as are described in the deed heretofore mentioned between the townsite company and the water company, dated March 31, 1889. This conveyance to the railroad company is alleged to have been with knowledge of the claim and rights of plaintiff and its predecessors. Defendants the Montana Central and Great Northern Railway Companies are operating railway lines over said lots 1 and 8. Plaintiff, finding its original main inadequate to supply the city and its inhabitants with water, proceeded, in 1895, at considerable expense, and with defendants' full

knowledge, to lay another main parallel to the original one, about 18 feet away, and was about to cross the said lots 1 and 8 with the new main, when interfered with by defendants. Plaintiff owns the only system of water supply for the city, and alleges that it will suffer irreparable damage unless allowed to carry out its obligations to supply the city and its inhabitants. Plaintiff also alleges that by reason of the modification of the right of way and its holding, occupancy, use, and possession since August, 1889, with defendants' full knowledge, it has become and is the absolute owner of said right of way, and by defendants' acts and failure to object to plaintiff's occupancy and use they are estopped from contesting plaintiff's right to occupy said ground as a right of way.

The defendants deny any modification, or change, or substitution in the original deed, or that any main was ever laid in pursuance of any change in the right of way described in the deed delivered to plaintiff; deny that the first main was laid under claim of right on the part of plaintiff, but admit that the main was laid with the concurrence and consent of the townsite company, and has been maintained since by the license of the townsite company and its successors down to within six months preceding the institution of this suit. Defendants plead the purchase of the property involved by the deed from the townsite company of August, 1890, with the exception therein heretofore described, and aver actual occupation and possession of the whole of the premises by railway lines long before March, 1890. The necessity to lay the new main along the line adopted is denied, it being pleaded that it can well be laid along the course described in the deed from the townsite company to the plaintiff. Defendants ask to have their title quieted, and that plaintiff be required to remove both its mains within a reasonable time.

The case was tried by the court. Findings and conclusions for plaintiff. New trial was denied. Defendants appeal. Further facts in the case appear in the opinion.

A. J. Shores, for Appellant.

There are two principal questions to be determined in this case. First, does the evidence show a right in the water company to maintain its original main in its present condition? Second, has the water company established its right to an injunction against interference with the laying of the second main? These two questions are entirely distinct and do not necessarily require the same answer. Of course if the right of the water company to continue its original main in its present condition cannot be sustained, it could hardly be pretended that it has any right to lay the new main, but on the other hand it does not follow that there is a right to lay the new main, even if the court should find that the original main cannot now be disturbed. (Citing, *Larned* v. *Larned*, 11 Met. 421; *Pope* v. *Devereux*, 5 Gray, 409; Vol. 2 Wash. on Real Prop. 340; *Howlett* v. *Miller*, 63 Cal. 185; *Swayne* v. *Seamons*, 9 Wall. 254; *Chesapeake & O. Canal Co.* v. *Ray*, 101 U. S. 522; Tiedeman on Real Property, Sec. 597; Washburn's Easements and Servitudes, Sec. 6; *Totel* v. *Bonefoy*, (Ill.) 14 N. E. 686; *Crusdale* v. *Lannigan*, (N. Y.) 29 N. E. 824; *Cook* v. *Stearns*, 11 Mass. 533; *Stevens* v. *Stevens*, 52 Mass. 251; *Hodgkins* v. *Farrington*, 150 Mass. 19; *Thomke* v. *Fielder*, 64 N. W. 1030; *Wilson* v. *St. P., M. & M. Ry. Co.* 41 Minn. 56; *Johnson* v. *Skillman*, 25 Minn. 95; *Minn. Western Ry. Co.* v. *M. & St. L. Ry. Co.*, 59 N. W.; *Minn. Mill Co.* v. *Minn. & St. L. Ry. Co.*, 51 Minn. 304; *Flick* v. *Bell*, 42 Pac. 813; *Steward* v. *Stevens*, 15 Pac. 786; *Kipp* v. *Crenan*, 7 N. W. 418.)

Clayberg, Corbett & Gunn, for Respondent.

The following legal propositions seem to be conclusive in our favor: First, the right of way granted by deed can be modified by a subsequent executed parol agreement. (*LeFevre* v. *LeFevre*, 8 Am. Dec. 696; *Jackson* v. *Litch*, 62 Pac. St. 451; *Pope* v. *Devereaux*, 5 Gray 409; *Larned* v. *Larned*, 11 Met. 421; *Swain* v. *Seamens*, 9 Wall 254; *Chesapeake etc. Canal Co.* v. *Ray*, 101 U. S. 522; *Hewlett* v. *Miller*, 63 Cal. 185; *Rummil* v. *Robbins*, 77 Me. 193; Sec. 228 Civil Code;

Kent Furniture etc. Co. v. *Long*, 69 N. W. 657.) Here the modification was of the entire right of way. The deed gave a right of way to lay necessary mains, not just one main. According to the testimony of all the witnesses, the change was of the "right of way." This would give the same rights with the new route as were granted with the old. If a consideration were necessary, it plainly appears. (a.) The surrender of the old right of way. (b.) The additional benefit to accrue to the townsite company, by having the main where it could supply lots then on sale on both sides of the street. Second, if it is considered as a parol agreement to grant a right of way, it having been executed by the water company, the result is the same. (*Hazleton* v. *Putnam*, 54 Am. Dec. 158, and notes *Rindge* v. *Baker*, 57 N. Y. 209; *Wynn* v. *Garland*, 68 Am. Dec. 190; *Russell* v. *Hubbard*, 59 Ill. 335; *Dillon* v. *Crook*, 11 Bush. 321; *Gilmore* v. *Armstrong*, 66 N. W. 998; *Simons* v. *Morehouse*, 88 Ind. 391; *Robinson* v. *Thrailkill*, 110 Ind. 117; *Flickinger* v. *Shaw*, 87 Cal. 126.) Third, if it is considered as a mere parol license to enter and lay the pipe, it became irrevocable by the acts of the water company. (*Wilson* v. *Chalfant*, 15 Oh. 248; *Snowden* v. *Wilas*, 19 Ind. 10; *Rerick* v. *Kern*, 14 Serg. & R. 267; *Raritan W. P. Co.* v. *Veghte*, 21 N. J. Eq. 475; *Lee* v. *McLeod*, 12 Nev. 280; *McBroon* v. *Thompson*, 37 Pac. 57; *Joseph* v. *Wild*, 45 N. E. 467; *DeGraffenried* v. *Savage*, 47 Pac. 902.) Fourth, defendants are in the same condition by virtue of an estoppel. (*Goodin* v. *Canal Co.*, 18 Oh. St. 169; *Mitchell* v. *New Orleans*, 6 So. 522; *Railroad* v. *Prudden*, 20 N. J. Eq. 530; *Railroad Co.* v. *Delaware Co.*, 21 N. J. Eq. 283; *Southern Marble Co.* v. *Darnell*, 21 S. E. 531; *Duke* v. *Griffith*, 35 Pac. 512; *Curtis* v. *Water Co.*, 25 Pac. 378; *National Water Works Co.* v. *Kansas City*, 65 Fed. 691; *Lawrence* v. *Railway Co.*, 4 Am. St. 265; *McAulay* v. *Railroad Co.*, 78 Am. Dec. 627; *Mosher* v. *Railroad Co.*, 60 Mo. 329; *Marble* v. *Whitney*, 28 N. Y. 297.) Fifth, the adverse and continuous occupancy for more than five years gave us this right of way beyond question. (*Pavy* v. *Vance*, 46 N. E. 898.)

But should the court be inclined to the opinion that the agreement of July only applies to the old main, and that the right of way for the new main must be claimed under the deed, in such case it is apparent under the above authorities that at least up to Tenth avenue south as extended, the new main must be sustained. This on the ground of estoppel. Also on the construction of deed itself. It gives the right to lay the main anywhere on the tracts lots one (1) and eight (8), only requiring us to cross the railroad track south of Tenth avenue, and follow along the railroad right of way to said street. No definite point of crossing the railroad track being mentioned, we could select the line, and having done so without objection and laid our pipe, the description was thereby made definite. (*Bannon* v. *Angdeir*, 2 Allen 128; *Stone* v. *Clark*, 1 Met. 378; *Wynkoop* v. *Burger*, 12 Johns. 222; *Jennison* v. *Walker*, 11 Gray 423; *Onthank* v. *Railroad Co.*, 71 N. Y. 194.) Counsel seems to rely upon the proposition that the water company, being entitled to exercise the right of eminent domain, if it desired to lay the pipe line where it did, it should have condemned a right of way. All that would seem necessary in reply to this is that the right of way has been occupied peaceably by the water company, under a claim of right, and that if the water company has no right to lay its main at that place and has the right to exercise eminent domain, the fact that it has laid its main would place the burden upon the railroad company, if it objected to it, to institute suit for damages for the occupation. (*Lawrence* v. *Railroad Co.*, 4 Am. St. Rep. 265; *McAulay* v. *Western R. R. Co.*, 78 Am. Dec. 627; *R. R. Co.* v. *Prudden*, 20 N. J. Eq. 535; *Erie Ry. Co.* v. *Delaware Co.*, 21 N. J. Eq. 283; *Mitchell* v. *New Orleans, etc., Ry. Co.*, 6 So. 522.)

Hunt, J.—We gather from the evidence that Tenth avenue south, in the city of Great Falls, lies between Ninth avenue south and the water company's water station; that the Sand Coulee Branch of the Montana Central Railroad runs across the lots involved, and was in operation before the townsite

company conveyed an easement to the water company by the deed dated March 31, 1889; that instead of running its mains, after crossing the Sand Coulee Branch of the Montana Central, along the southerly line of the right of way of the said branch to Tenth avenue south, and from the point where the same intersects Tenth avenue south in the streets and alleys as required by the deed, plaintiff laid its pipe directly to Ninth avenue south.

It is now argued that the evidence shows that in July, 1889, the townsite company, acting through its president and secretary, orally agreed to a modification of the right of way described in the deed, and that pursuant to such agreement the main entered Ninth avenue south instead of Tenth. And upon this oral "modification" or "substituted" right of way plaintiff contends it may rely as fully as though a grant had been specifically described in the deed.

T. E. Collins, a member of the Great Falls Water Company in 1889, and the official of the company who managed its affairs until it began to sell water, negotiated for the site for the pumping station, which was practically given to the plaintiff by the townsite company. These negotiations commenced in 1889 with C. A. Broadwater, then president of the townsite company. Mr. Collins said that the route was planned, and a draft made of a line direct from the pumping station to Ninth avenue from the works. This was talked of before the execution of the deed above referred to and delivered, and negotiations were made on that basis. A deed was prepared early in the spring of 1889, conveying a right of way and pumping station to the water company, the line of right of way being direct from the pumping station to Ninth avenue from the works. This right of way crossed part of the southwest block of the town lying between Ninth and Tenth avenues south. This deed, however, was not signed, so another one was executed, describing the right of way heretofore referred to and granted, which is different from the proposed route included in the first deed, not executed. The water company objected to the route included in this latter deed on account of expense

to be incurred by following the line described, and because there was no one to be served on the Tenth avenue property, which was not then on the market. Nevertheless, the deed was accepted by the company, and no change was made in the terms thereof. Mr. Collins further testified that immediately thereafter negotiations were opened for a change of right of way; the result being that Broadwater, president of the townsite company, verbally authorized the water company to lay the main in a direct line from the pumping station to Ninth avenue south at its western terminus, so as not to pass the platted lots as shown by the first line. The water company then constructed the line from the pumping station along the western terminus to Ninth avenue south, without objection by any one. On cross-examination Mr. Collins testified that it was early in July, 1889, that he and Broadwater definitely determined that the main could be laid as it afterwards was laid. Witness remembered an interview with Broadwater, in which he told him the water company would want another deed, and Broadwater said he had made two already, and that was enough, that he would not be bothered with any more; that witness then explained to Broadwater the benefit to both parties by the proposed change, whereupon Broadwater agreed that the line to Ninth avenue was satisfactory; that the first deed prepared showed practically the line adopted, but that the townsite company refused to execute it, after having agreed to give it. A month afterwards, perhaps, witness continued, the deed actually delivered and accepted was prepared; that no agreement was ever entered into between the water company and the railroad companies with reference to a license of any kind, and that no objection was made by the railway people to the water company's crossing the tracks with its pipe lines; nor did the water company apply to the railway companies for permission to lay its main.

This testimony is the most material in the case, inasmuch as it is the basis of the plaintiff's claim of an absolute grant. We cannot agree, though, that it warrants the contention that there was a substitution of the right of way occupied for that

granted, or that it was ever understood that the easement conveyed was to be abandoned by the water company, and that the line which was occupied was the only one claimed. The refusal of Broadwater in the first instance to execute a deed direct to Ninth avenue shows the unwillingness of the townsite company at that time to do what respondent now argues it afterwards did by oral modification of the written deed. Subsequently the deed of grant to Tenth avenue south was executed, delivered and accepted. There was no possible mistake in its terms; on the contrary, there seems to have been unusual care exercised by both parties; and, although the water company did not get the right of way it first sought, it did get a deed of an easement and accepted the same. Previous negotiations culminated in the delivery and acceptance of this instrument. The various conversations had prior to its execution in relation to its contents ceased thereafter to be of material value. Then the water company took up the matter again, and, for reasons of convenience and economy, sought to obtain another right of way, by which its main would go down to Ninth avenue south; in other words, it tried to get what had theretofore been positively refused by the townsite company. Thereafter Broadwater, president of the townsite company, verbally "authorized" the water company to "lay the main in a direct line from the pumping station to Ninth avenue south at its western terminus, so as not to pass the platted lots as shown by the first line;" but he again refused to give a deed therefor. The water company afterwards laid its first main from the pumping station to Ninth avenue south, but as yet has never made use of the easement described in the deed.

Passing, as unnecessary for decision, the serious question of Broadwater's authority to represent the townsite company by oral agreement to a modification or change of a right of way from that described in the deed, and assuming he did have such power, we yet fail to find substantial evidence to support any greater claim on respondent's part than a right resting simply in a parol license to lay the main then desired to be laid in a direct line from the pumping station to Ninth avenue south.

Mr. Collins does not testify that he agreed with Broadwater that the water company would abandon the easement granted, or that the one sought should be given and accepted in lieu of the one granted; and it is our opinion, from the evidence, that the findings, predicated upon the argument of a substituted or exchanged right of way, are clearly against the evidence, and cannot stand. The water company therefore still owns its easement as described in the deed. This is an absolute right by grant. There is no evidence of its surrender or abandonment by the company, or of the performance of any act by the appellants, or their predecessors in interest, inconsistent with a recognition of the water company's rights under the deed.

The judgment of the district court in effect awarded the water company an easement. This would require that the water company have an interest in the land across which the pipes are laid. Such an interest, however, cannot be created or granted except by written deed or conveyance, or by prescription. A license, on the other hand, being, by the definition of Jones in his late book on easements, "a personal and revocable privilege to do some act or series of acts upon the land of another without possessing any estate therein," may be created by parol. The one gives immunity to the licensee while acting under the privilege, but yet confers no vested right by which he can rightfully enjoy it contrary to the will of the grantor; while an easement implies a permanent interest in the land. (*Wiseman* v. *Lucksinger*, N. Y. 38 Am. Rep. 483.) The water company, under its license, was given the right to enter upon the line of right of way actually subsequently occupied, subject to the will of the townsite company; but to enforce an oral agreement pertaining to real estate the rule is there must be a complete and sufficient contract, founded not only on a valuable consideration, "but its terms defined by satisfactory proof, accompanied by acts of part performance unequivocally referable to the supposed agreement." (*Cronkhite* v. *Cronkhite*, 94 N. Y. 323.) There is no such case before us.

Having now distinguished the attitude of the water company towards the townsite company when it entered upon the premises occupied as that of a mere parol licensee, is the position correct that, because the main was laid at great expense, without objection from the owner of the ground or the railroad companies, and maintained over six years before the suit was instituted, its right has become fixed by continuous adverse possession under a claim of right, and is the proposition tenable that the parol license to enter and lay the main has become irrevocable by the acts of the water company? The principle of the common law was that a parol license to be exercised upon the land of another creates an interest in the land, is within the statute of frauds, and is subject to revocation by the licensor at any time, even though the licensee has exercised acts under the license, or made expenditures in reliance thereon. (Freeman's note to *Lawrence* v. *Springer*, 31 Am. St. Rep. 715; 24 Atl. 933.) This rule obtains in many jurisdictions, while in others the doctrine of estoppel is invoked, whereby a licensor is not allowed to revoke the license where he has suffered the licensee to do acts thereunder, or to make expenditures thereon. That a license is revocable is sustained by the decided weight of authority. From the many cases examined we have selected a few where the rule is well stated, and where the conflicting authorities are reviewed:

In *Pitzman* v. *Boyce*, 111 Mo. 387, 19 S. W. 1104, the parties were adjoining landowners. The plaintiff laid a sewer pipe on defendants' land, without her consent, although she was informed of it, and of its purpose. five years after it was laid. In 1889 plaintiff expended several hundred dollars in perfecting his system of drainage. That same year, defendant being about to sever the pipe between her land and that of the plaintiff, the latter enjoined the former from disturbing the pipe. The court used the following language: "The right in this case, then, must be regarded as merely permissive; in short, a license. Now, from its very nature, a license is revocable, but the authorities are divided as to whether a license is revocable after it has been executed, money

expended, etc. Touching this point, an eminent author observes: 'Some of the courts, indeed, deny the right of the [parol] licensor even to revoke the license, after outlay under it, resting the case on the ground of estoppel *in pais*, or treating the situation as equivalent to part performance of a parol agreement for the sale of an interest in real estate. But the better view, in presence of the statute of frauds, appears to be that, so far as the question of further enjoyment is concerned, the license may be revoked, though no action can be maintained against the licensee for what he has been induced or led to do.' (Bigelow on Estoppel (5th Ed.) 666, 667)."

In *Crosdale* v. *Lanigan*, 129 N. Y. 604, 29 N. E. 824, an action was brought to enjoin defendant from tearing down a stone wall erected on the defendant's land by the plaintiff under a parol license from the defendant, and in the erection of which the plaintiff had expended in labor and materials a sum exceeding $100. The theory upon which that case was tried was that the plaintiff was a licensee, and had a right to build the wall on the defendant's land, which, when executed, beame, in equity, irrevocable. The trial judge followed the rule that the license to enter upon defendant's land, when acted upon by the plaintiff, conferred upon him a right in equity in the nature of an easement to maintain the wall on defendant's lot. "If this claim is well founded," said the appellate court, "there has been created, without deed, and in violation of the statute of frauds, an interest in the plaintiff and his assigns in the land of the defendant, impairing the absolute title which he theretofore enjoyed, and subjecting his land to a servitude in favor of the adjacent property. It is quite immaterial in result that this interest claimed, if it exists, is equitable, and not legal. An incumbrance has been created upon the defendant's lot, and his ownership, to the extent of such interest, has been divested. We are of opinion that this judgment is opposed to the rule of law established in this state. There has been much contrariety of decision in the courts of different states and jurisdictions. But the courts of this state have upheld with great steadiness the

general rule that a parol license to do an act on the land of the licensor, while it justifies anything done by the licensee before revocation, is, nevertheless, revocable at the option of the licensor; and this, although the intention was to confer a continuing right, and money had been expended by the licensee upon the faith of the license. This is plainly the rule of the statute. It is also, we believe, the rule required by public policy. It prevents the burdening of lands with restrictions founded upon oral agreements, easily misunderstood. It gives security and certainty to titles, which are most important to be preserved against defects and and qualifications not founded upon solemn instruments. The jurisdictions of courts to enforce oral contracts for the sale of land is clearly defined and well understood, and is indisputable; but to change what commenced in a license into an irrevocable right, on the ground of equitable estoppel, is another and quite different matter. It is far better, we think, that the law requiring interests in land to be evidenced by deed should be observed than to leave it to the chancellor to construe an executed license as a grant depending upon what in his view, may be equity in the special case."

In *Minneapolis Mill Co.* v. *Minneapolis & St. Louis Ry. Co.*, 51 Minn. 304, 53 N. W. 639, in an action brought by plaintiff to recover the possession of certain lands occupied by the tracks of the defendant, the court said: "The most, we think, that can be possibly claimed from the evidence, is that tracks were built under a parol license from plaintiff; and there is nothing better settled than that a mere license, not subsidiary to a valid grant, may be revoked at pleasure, and does not create or transfer any interest in land, even though granted for a valuable consideration, and though the license may be for a purpose which involves the expenditure of money upon the faith of it. The mere fact that the mill company might have, without objection, permitted the railroad company to expend large sums of money in building tracks on the land on the faith of the license, would not operate as an estoppel. A licensee, is conclusively presumed, as a matter of

law, to know that a license is revocable at the pleasure of the licensor; and, if he expends money in connection with his entry upon the land of the latter, he does so at his peril. Any other doctrine would render most licenses irrevocable, and make them operate as conveyances of an interest in land."

The doctrine of this case is approved of in the still later case of *Minneapolis Western Ry. Co.* v. *Minnesota & St. Louis Ry. Co. et al.*, reported in 58 Minn. 129, 59 N. W. 983. In that case the court said that "the law is jealous of a claim to an easement, and the party asserting such a claim must prove his right to it clearly. It cannot be established by intendment or presumption." To the same effect are the following authorities: *Hodgkins* v. *Farrington*, 150 Mass. 19, 22 N. E. 73; *Lawrence* v. *Springer*, *supra; Hathaway* v. *Yakima Water, etc. Co.*, 14 Wash. 469, 44 Pac. 896. Many decisions upon the conflicting sides are collated by Browne in his note to *Wood* v. *Leadbitter*, 13 M. & W. 838, 16 Eng. Ruling Cas. 49.

The supreme court of the territory of Montana, in *Fabian* v. *Collins*, 3 Mont. 215, after affirming the general doctrine that a license is limited to the original parties, and cannot be sold or transferred, recognized the right of the licensors to revoke a license to use certain waters for mining purposes; citing Washburn on Real Property and Washburn on Easements and *Babcock* v. *Utter*, 32 How. Pr. 439. *Babcock* v. *Utter* decided that a license, even after the construction of a dam by the licensee, was revocable, and the leading English case of *Wood* v. *Leadbitter*, *supra*, decided in 1845, was affirmed. Selden, J., made it clear in his opinion in the New York case that, if the position that a license such as the plaintiff at bar was given is irrevocable, the parol license by reason of expenditures made in pursuance of it lost its character as a mere personal privilege, and became a grant in fee of the right claimed by the water company.

The principle, which cannot be disregarded, is that, where there is a mere parol license,—for example to lay a water main across the licensor's lots,—a perpetual right cannot be

maintained, inasmuch as it cannot be granted by parol without doing violence to the statute of frauds (Section 217 of the Compiled Statutes, 1887; Section 2185 of the Civil Code), which invalidates the conveyance of any interest in lands, other than agreements for leasing for a short period, without writing. Now, the sequence of the rule that an easement can only be created by deed is that a license which merely renders lawful an entry which otherwise would be unlawful cannot, except by prescription,—which is equivalent to a deed,—become an absolute right in property without practically doing away with the statute of frauds, and completely overturning the common-law rule, as pointed out by Baron Alderson in *Wood* v. *Leadbitter*, *supra*; Browne, Statute of Frauds, Section 29.

An extended examination of cases bearing upon the doctrine of the revocability of parol licenses has impressed upon us the belief that the sound, the logical, as well as the safe, reasoning sustains the rule that a parol license of the character of the one under consideration is always revocable at the pleasure of the licensor, so far as any further enjoyment of the privilege extended goes. Freeman's note to *Lawrence* v. *Springer*, *supra*. Modern text writers, deducing principles from the more recent opinions of the courts, have taken this view of the subject; and to give that security to titles so essentially important in affording protection against flaws, and burdens not imposed by writing, but resting upon verbal permissions or agreements, it is well settled that the doctrine of estopppel is inapplicable, "inasmuch as the licensee is bound to know that his license was revocable, and that in incurring expense he acted at his own risk and peril." Browne on St. Frauds (5th Ed.) Section 31; Jones on Easements, Section 69.

Care should be taken always to distinguish between the facts of a case like that before us and one where parties have made a verbal agreement, even if in the form of a license, by which an interest in the land is contracted for, and where, under such verbal agreement, and relying upon it, possession in good faith is taken, and valuable improvements are made, or where such conditions exist that equity will hold the grantee

entitled to an affirmance of his rights. We there encounter the equitable doctrine of part performance, where a verbal contract for the sale of an interest in land may be specifically enforced. Nor must a parol license be confounded with an easement which, by grant or reservation, is appurtenant to land, and which passes by deed from the owner to his grantee without particular mention,—as does an interest in a ditch and water right by a deed of a ranch, if existing in favor of the place at the time of the conveyance thereof, and necessary to its cultivation and enjoyment. (*Tucker* v. *Jones*, 8 Mont. 225, 19 Pac. 571; *Sweetland* v. *Olsen*, 11 Mont. 27, 27 Pac. 339; *Sloan* v. *Glancy*, 19 Mont. 70, 47 Pac. 334.) But in the cases instanced different principles control, and the authorities cited to the question under discussion become inapplicable.

Nor, under the circumstances, could the use of the ground in which the pipe line is laid ripen into an easement by prescription. There can be no adverse use and possession where one holds under license from another. There is an inconsistency between the two claims. When one enters and holds in pursuance of a license, the holding is not adverse, and no presumption of a grant from adverse possession can arise out of it. In *Pitzman* v. *Boyce*, *supra*, plaintiff claimed a prescriptive right, but it was held that, the use having been permissive in its inception, such permissive character, being stamped on the use at the outset, will continue of the same nature; and that no adverse user can arise until a distinct, positive assertion of right, hostile to the owner, and brought home to him, or change a subordinate and friendly holding into a contrary one, exclusive and independent in its character. The water company in the case at bar has never repudiated the license, and claimed adversely to the owner of the ground, with knowledge of such claim and acquiescence in it by the owner of the land. Respondent, therefore, has acquired no easement by prescription. Jones on Easements, Section 179.

So, without recapitulating the testimony at length, we conclude that the findings that the original main has been maintained and held by the water company, since the laying

thereof, by an exclusive, adverse, open, or notorious holding under claim of right, are against the evidence and must be disregarded.

The water company has simply lost its right to continue its main where it was placed. In such a case the licensee should be allowed to remove its property within a reasonable time after notice of the revocation by the licensor, or of acts deemed to be a revocation by the licensor. This removal should be at the expense of the licensee, and without unnecessary harm to the rights of the appellants. If plaintiff does not remove its main, or proceed in eminent domain, within a reasonable time, defendants should have the right to remove it. This we believe to be just, and within the power of the court. (*Hodgkins* v. *Farrington*, 150 Mass. 19, 22 N. E. 73.)

This disposes of the plaintiff's claims in regard to the old main, or the one laid in 1889, and leaves plaintiff in the position of a licensee who has made expenditures under his license, and whose license has been revoked by the licensor. The new main, or that laid in 1895, must also be removed by the water company within a reasonable time, unless condemnation proceedings are instituted. Plaintiff especially urges in support of its right to lay this main that the railroad companies, as successors in interest of the townsite company, are estopped from claiming that the plaintiff could not complete the new line, because they purchased with full knowledge of plaintiff's rights claimed, and encouraged the laying of the main. Under no circumstances can the plea of estoppel prevail. Plaintiff cannot claim an easement under the law just heretofore announced, while no rights can be granted it under a license, because the evidence expressly discloses that one McLaren, who at the time was the general superintendent of the Montana Central Railroad, one of the appellants, informed the representatives of the water company by letter dated October 30, 1895, and before the pipe was laid, that before the main could be laid on the grounds of the railroad company it would be necessary to make formal application, and to obtain permission to do so from higher authorities. An application was there-

after made in writing to lay the pipe on the right of way of the Great Northern Railway Company from the water works to Ninth avenue south, a distance of 2,240 feet, and from Ninth avenue south to Eighth avenue south, a distance of 450 feet. This was denied by the general manager, one C. H. Warren, the superior officer to the general superintendent, who suggested another route across the railroad company's grounds, and parallel with the boundary thereof until they reach Tenth avenue; but this suggestion was not followed out. There is no evidence to prove a license to lay the second main. The testimony of McLaren that he had no actual authority to give permission to do the acts desired, together with the fact that he notified the water company of this lack of authority, is convincing, and leaves plaintiff with nothing to support its contention in this respect.

It is next said that Broadwater, when he gave the license of 1889, granted permission to lay mains. The evidence, however, shows that only one main was talked of when Broadwater gave the license, and we can render the privilege efficacious only as to the one then under consideration.

Finally, the water company, falling back upon the deed of easement, says it was empowered by the terms of such deed to lay the new main to Tenth avenue south as extended. The orientation of the ground and pipe line routes is very difficult without a plat, but, as none has been furnished us, we must work it out as best we can from the evidence. The water company contends that the right granted is to lay the main anywhere across lots 1 and 8, provided the main crosses the track south of Tenth avenue, and follows along the railroad right of way to Tenth avenue. The deed does not specify in precise terms that mains must be laid from the pumping station in a direct line across the railroad track, but does recite that "the same shall be laid, after crossing the Sand Couleee Branch of the Montana Central, * * * along the southerly line of the right of way of the said branch to Tenth avenue south, * * * and, from the point where the same intersects said Tenth avenue south, the said mains shall be laid

in the streets and alleyways of said city." Now, it seems to us it was plainly contemplated that the main should cross the railroad before it reached Tenth avenue; otherwise, for what purpose was it specified that after such crossing it should run along the southerly line of the right of way to Tenth avenue? It is but a reasonable inference that the water company wanted to secure the most direct route to the point where it could serve the city with its main. Hence it would seem to follow that it would go as directly as it could from its pumping station to the point of crossing the railroad tracks, always keeping in view the requirement that by any route chosen it must run along the right of way of the railroad to Tenth avenue south. This being so, it is obligatory upon it to go to the nearest point along the southerly line of the right of way, and from such point it must continue along the line of right of way to Tenth avenue.

We have studiously examined all the points pressed by plaintiff, and our judgment is that the decree of the lower court stands without substantial evidence or approved authority to support it.

The judgment is reversed, and the cause is remanded for a new trial, with directions to the district court to proceed as indicated in this opinion, and also to ascertain and fix a reasonable time in which the water company must remove its mains, or proceed in eminent domain, as herein indicated.

Reversed and remanded.

PIGOTT, J., concurs. PEMBERTON, C. J., not sitting.

21	507
f22	213
f23	448
21	507
26	253
26	254
21	507
29	88

W. H. BABCOCK, APPELLANT, *v.* F. A. MAXWELL, RESPONDENT.

[Submitted Oct. 5, 1898. Decided Oct. 24, 1898.]

Pleading—Replication—Counterclaim — How Pleaded — Estoppel by Pleading—Assignee for Creditors—Leave to Sue.

1. PLEADING—*Replication.*—Under the Code of Civil Procedure of 1895, new matter set up in the answer as a defense, and not constituting a counterclaim, is deemed denied without a replication.
2. COUNTERCLAIM.—An answer, in an action of replevin, to the effect that the defendant took possession of the chattels as the assignee of one who had been in possession thereof for a long time, that plaintiff knowingly allowed the defendant to sell the same, and that by reason thereof plaintiff was estopped from maintaining this, does does not state a counterclaim as the same is defined in Section 691, Code of Civil Procedure.
3. SAME—*How Pleaded—Estoppel by Pleading.*—A defendant, to entitle himself to a motion for judgment for want of a reply to a counter-claim, must plead it as such; and he is estopped from asserting that matter which in his answer he denominates "an equitable defense," is in fact a counterclaim.
4. ASSIGNEE FOR CREDITORS—*Leave to Sue.*—One who has been appointed by the court the successor of an assignee of an insolvent, may be sued without leave of court.

Appeal from District Court, Gallatin County; F. K. Armstrong, Judge.

ACTION by W. H. Babcock against F. A. Maxwell. From a judgment for defendant on the pleadings, plaintiff appeals. Reversed.

Statement of the case by the justice delivering the opinion.

The complaint in this action states, in substance, that on October 6, 1895, plaintiff was the owner and possessed of certain lumber in Gallatin county, and that the defendant then and there unlawfully took the same, and converted it to his own use, for which wrong judgment in a sum equal to the value thereof is demanded. The answer contains a denial of each allegation of the complaint, and sets up, "as equitable defense," the following facts: That in September, 1895, one Wilkinson made an assignment for the benefit of his creditors

to one McClellan; that the assignment was made in all respects under the provisions of Title 3, Part 2, Div. 4, Civil Code, entitled "Assignment for the Benefit of Creditors;" that on September 11, 1895, McClellan took possession of all the property of Wilkinson, among which property were about 70,000 feet of lumber, and that McClellan, as assignee, held the same in his custody until October 3, 1895, when, by order of the judge of the district court of Gallatin county, McClellan was discharged as assignee, and the defendant was then duly appointed as assignee in the place and stead of McClellan, with authority to carry out and complete the trust according to the terms and conditions of the assignment, and that he received all of the estate of Wilkinson which McClellan then held; that thereupon the defendant qualified as assignee, and ever since that time has been acting in the discharge of his trust as assignee. The answer further alleges that the plaintiff "has never at any time made any demand upon the defendant, although he well knew that the defendant was acting as such assignee and officer of said court, but stood by and allowed this defendant as such assignee and receiver of said court, to sell and dispose of all said property, particularly the said 70,000 feet of lumber, more or less, as the property of said Wilkinson, and in pursuance of the trust imposed upon him by the order of said court, and made no demand whatever prior to the bringing of this suit for the said property, or any thereof, upon this defendant; that the doings of this defendant as hereinbefore set forth, in and about the receiving of said property of said Wilkinson from said assignee McClellan, and selling and disposing of the same by the direction of this court in said order contained, are the acts and things, and the only acts and things, of which the plaintiff complains herein." The defendant avers that the conduct of the plaintiff bars and estops him from prosecuting or attempting to maintain this action, and that the plaintiff did not obtain an order of the court to bring the action. The prayer of the answer is that the plaintiff be enjoined from prosecuting this action, or attempting in any way to prosecute it, against the de-

fendant; that the court adjudge that the plaintiff was not entitled to maintain the action, and is estopped to maintain it; and that the plaintiff recover nothing; and that defendant have his costs.

Thereafter, when the cause was called for trial, the defendant asked the court to dispose of the equitable defense raised by defendant's answer, and moved for judgment on the pleadings, upon the grounds "that all the facts in the equitable defense in the defendant's answer are admitted to be true; that said new matter and equitable defense constitutes a complete defense to plaintiff's cause of action; that it is admitted that no order of the court was obtained to bring this action; that the answer of the defendant and the facts admitted show that the plaintiff is estopped to bring this action; that all the material matters set forth in the defendant's equitable defense are admitted to be true."

The court sustained the motion for judgment on the pleadings, and rendered judgment that the plaintiff take nothing by his complaint, and that the defendant go hence without day, and recover his costs. From that judgment plaintiff appeals.

C. E. Sutton, *B. S. Thresher* and *O. L. Bishop*, for Appellant.

Luce & Luce, for Respondent.

PIGOTT, J.—1. From the foregoing statement it is manifest that the court, as well as the defendant, treated the so-called "equitable defense" as new matter, not constituting a counterclaim; and it is equally plain that the court rendered judgment upon the ground that the allegation of such new matter must, in the absence of a reply, be taken as true. Such being the theory upon which the motion for judgment was made and sustained, we deem it proper for the present purpose to adopt the view of the court below to the extent of conceding that the affirmative averments of the answer set up new matter constituting a defense. In other words, we do not determine whether the answer contains the statement of

any new matter constituting a defense, but shall treat it, as did the district court, as pleading some material matters in defense, which may not be proved under the denial.

The question first presented is, therefore, must the material allegations of new matter in defense be taken as true unless controverted by a reply? Explicit answer is made by the Code of Civil Procedure. Section 690 prescribes, among other things, that the answer must contain a statement of any new matter constituting a defense or counterclaim. Section 720 is as follows: "Where the answer contains a counterclaim, the plaintiff, if he does not demur, may, within twenty days after service of the answer, reply to the counterclaim. The reply must contain a general or specific denial of each of the material allegations of the counterclaim, controverted by the plaintiff, or of any knowledge or information thereof sufficient to form a belief, or a specific admission or denial of some of the allegations of the counterclaim, and also a general denial of all the allegations of the counterclaim not specifically admitted or denied in the reply; and it may set forth in ordinary and concise language, without repetition, new matter not inconsistent with the complaint, constituting a defense to the counterclaim."

Section 722 provides that, if the plaintiff fail to reply or demur to the counterclaim, the defendant shall be entitled to the same relief as a plaintiff upon failure of defendant to demur to or answer the complaint. Section 754 reads as follows: "Each material allegation of the complaint, not controverted by the answer, and each material allegation of new matter in the answer, not controverted by the reply, where a reply is required, must, for the purposes of the action, be taken as true. But an allegation of new matter in the answer, to which a reply is not required, or of new matter in a reply, is to be deemed controverted by the adverse party."

The sections referred to are quite similar to the provisions of the Code of Civil Procedure of New York upon the same subject. Sections 514 and 522 of the code last named are, so far as pertinent to this question, the same as Sections 720 and

754 of the code of Montana. It is held under these sections of the New York code that a reply is not necessary to form an issue upon new matter pleaded in defense. (*Arthur* v. *Homestead Fire Insurance Co.*, 78 N. Y. 462; *Springer* v. *Bien* (Com. Pl.) 10 N. Y. Supp. 530; *Burke* v. *Thorne*, 44 Barb. 363; *Dambman* v. *Shulting*, 4 Hun. 50; *Argall* v. *Jacobs*, 87 N. Y. 110; *Aryotsinger* v. *Vines*, 82 N. Y. 308.) It may be urged, however, that Sections 721 and 723 of the Code of Civil Procedure of Montana indicate that the legislature intended that an affirmative defense, unless replied to, must be taken as true.

These sections are as follows: Section 721. "A reply may contain two or more distinct avoidances of the same defense or counterclaim, but they must be separately stated and numbered." Section 723. "The defendant may also demur to the reply, or to a separate traverse to, or avoidance of, a defense or counterclaim, contained in the reply, on the ground that it is insufficient in law upon the face thereof."

But we are satisfied that Section 720, *supra*, prescribes the only conditions permitting a reply, and that Sections 722 and 754, *supra*, declare the effect of a failure to reply, which pleading is not required unless plaintiff desires to interpose a defense to a counterclaim. Our code omits Section 516 of the Code of Civil Procedure of New York to the effect that the court may, in its discretion and on defendant's application, direct plaintiff to reply to new matter constituting a defense by way of avoidance, and that in such case the reply and proceedings upon failure to reply are subject to the rules applicable to the case of a counterclaim. Section 517 of the New York code is identical with Section 721, *supra*, of the Montana code, and was, as to the declaration concerning the contents of a reply to a defense, enacted for the obvious purpose of supplementing Section 516; and it is only by virtue of the provisions of Section 516 that a reply to new matter in avoidance may be filed. (*Dillon* v. *Railway Co.*, 46 N. Y. Super. Ct. Rep. 21.) Since in Montana, a reply is not necessary to put in issue the truth of allegations of new matter

constituting a defense, and since, in Montana, the court may not require such reply the provisions of Sections 721 and 723, *supra*, referring to a reply in avoidance of a defense, and to a demurrer by defendant to such avoidance, fail to serve the end attained in New York by similar provisions, which are in *pari materia* with, and exist because of, a statute of that state authorizing the court to direct the filing of a reply to a defense by way of avoidance.

Under the present code of this state, the allegations of new matter in defense are deemed controverted by the plaintiff. The court erred, therefore, in sustaining the motion upon the grounds therein stated.

2. The defendant contends in this court that the affirmative matter set up in the answer constituted a counterclaim, and that the district court, in the absence of a reply, rightly gave judgment on the pleadings. Plaintiff, on the contrary, insists that a counterclaim was not pleaded. The contention over this question has been earnest, and, on the part of the defendant, somewhat extended.

The answer does not state facts sufficient to constitute a counterclaim, as defined in Section 691 of the Code of Civil Procedure. Unless the matter alleged, taken by itself, and without reference to the complaint, would, if proved, entitle defendant to judgment against the plaintiff, a counterclaim is not pleaded; that is to say, a counterclaim is a cause of action existing in favor of defendant, and against the plaintiff, and must therefore contain a statement of such facts as would be requisite to the sufficiency of a complaint, and must, in stating a cause of action, be complete within itself. "It must be a cause of action; in other words, the facts must be such that they would constitute the entire matter proper and necessary to be set forth in the complaint or petition, if the defendant had chosen to institute an independent action between himself as plaintiff and the plaintiff as defendant. When a counterclaim is pleaded, the defendant becomes, as far as respects the matters alleged therein, an actor. There are substantially two simultaneous actions pending between the same

parties, each of whom is at the same time a plaintiff and a defendant. Since the counterclaim states a cause of action, it is to be governed and judged by the rules which apply to the complaint. The facts alleged must be sufficient to constitute a cause of action." (Pomeroy's Code Remedies, Section 738; *Wabash etc. Union* v. *James* (Ind. App.) 35 N. E. 919.)

It is apparent that the answer does not state facts sufficient to constitute a cause of action against the plaintiff. The plaintiff sued for the conversion of personal property alleged to belong to him. The answer, after a general denial, states that certain lumber was once owned by Wilkinson, who assigned the same with his other assets to McClellan, for the benefit of his creditors; that upon the discharge of McClellan, the defendant was appointed assignee by the judge of the district court, and received and disposed of said property as assignee; that plaintiff did not obtain an order to bring the action; and that plaintiff knowingly stood by and allowed defendant to sell the property, and made no demand therefor before bringing the suit; and that the acts of the defendant so pleaded are the only acts of which the plaintiff complains. Here is nothing which, if proved, would entitle defendant to affirmative relief, unless the dismissal of the complaint and the awarding of costs to him be so considered. Were the defendant receiver of the estate of the insolvent, the omission to obtain leave of court to sue would, even if leave were necessary, be mere matter of defense in bar of the present action; and so with the supposed plea of estoppel. It is, moreover, apparent that the defendant is not the receiver, but is the assignee appointed in the place of the original assignee, and clothed with such powers only as were possessed by his predecessor. Examination of Sections 4510 to 4535 of the Civil Code, which merely regulate common law assignments for the benefit of creditors, and of Sections 950 to 956 of the Code of Civil Procedure, relating to receivers, demonstrates the fact that neither an original assignee nor his successor, as such, is a receiver. These observations as to the character of defendant's trust may not

be pertinent to any question involved in the determination of this appeal. His insistence that he is a receiver has, however, induced us to dispose of the point by a reference to the statutory provisions whereby his contention is confuted.

There is a further and controlling reason why the alleged new matter set up in the answer should not be treated as a counterclaim. It is denominated an "equitable defense," and does not purport to be a counterclaim. Defendant having characterized his pleading as a defense, is bound by the choice he makes, and may not afterwards be heard to assert that it is a counterclaim. (22 Am. & Eng. Ency. Law, 423, and cases there cited.) A counterclaim must be described as such where the question turns upon the want of a reply. "Such a rule is essential to protect a plaintiff from being misled by an answer, and to prevent the snare of a counterclaim lurking under the cover of a supposed defense, and unconsciously admitted by a failure to reply." (*Baker* v. *Hotchkiss*, 97 N. Y. at page 408. See, also, Pomeroy's Code Remedies, Sec. 748, note 1; Boone, Code Pleadings, Sec. 101, and cases there cited in notes.) This rule, which is supported by the decided weight of authority, is both simple and just. The defendant insists, however, that the decision in *Davis* v. *Davis*, 9 Mont. 267, 23 Pac. 715, is conclusive of the case at bar. In that case the only question necessary to be decided was whether an answer stated facts sufficient to constitute either a defense or a counterclaim; but, even if that decision is correct, it cannot control the determination of the question now presented, for the reason that in the Davis case no advantage was sought because of failure to reply, and for the more weighty reason that, under the statutes then in force, all averments of new matter in the answer, whether by way of defense or as constituting a counterclaim, not traversed or avoided by reply, were admitted to be true. Then the plaintiff knew that, by failing to reply, he admitted the truth of all the new matter alleged in the answer. Now he knows that the statement of new matter in defense is deemed controverted or avoided, and that it is necessary to reply only when a counterclaim is set up. "In

all the states but one or two, the plaintiff must reply to a counterclaim, or its averments of fact are admitted to be true. He ought not to be subject to this penalty unless he is told in the most express terms that the pleading is a counterclaim." (Pomeroy's Code Remedies, Sec. 748.) In California, where no reply whatever is allowed, the allegations of new matter of defense and of counterclaim are deemed denied or confessed and avoided; and even there it is said that, "where matters which are proper matters of defense are pleaded as such, we are clear that they should be regarded only as such, notwithstanding a prayer for affirmative relief at the conclusion of the answer. The matters of the cause of complaint must be separately stated as a cause of action against the plaintiff, and not as a defense to the plaintiff's cause of action." (*Doyle* v. *Franklin*, 40 Cal. 110; *Brannan* v. *Paty*, 58 Cal. 330; *Carpenter* v. *Hewel*, 67 Cal. 589, 8 Pac. 314.)

The motion for judgment on the pleadings should have been denied. The judgment is therefore reversed, and the cause remanded.

Reversed and remanded.

HUNT, J., concurs.

J. J. YORK, RESPONDENT, v. JOHN M. STEWARD, ET AL., APPELLANTS.

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[Submitted Oct. 24, 1898. Decided Nov. 7, 1898.]

Landlord and Tenant—Lease—Written Contract—Oral Modification of—Implied Warranty—Fraudulent Representations—Pleading—Eviction by Landlord—Evidence.

1. In the absence of fraud, accident or mistake, oral evidence will not be admitted to the effect that the lessor, at the time of making a written lease, or prior thereto, orally warranted the condition of the premises, or that he agreed to make repairs.
2. In the lease of a house there is no implied warranty that the property is fitted for the use for which it is let or for any purpose, or that it will remain in a tenantable condition.
3. An answer which merely alleges that the plaintiff falsely represented that a building which he was about to let to plaintiff was suitable for a particular purpose, does not assert a fraudulent misrepresentation or concealment.

4. In an action to recover rent for premises leased to defendant, it is error to refuse evidence tending to show that the plumbing in a portion of the house which was in full possession and control of plaintiff and was immediately over the room let to defendant, was defective; and that by reason thereof and of plaintiff's refusal to remedy the defect, water overflowed, ran down into the storeroom leased to defendant and deprived him of the use thereof; as the evidence tended to show a constructive eviction.

5. An application to amend a pleading during trial is properly refused, when the amendment is not sought for the purpose of making the allegations correspond with evidence already introduced, and when no necessity for the amendment is shown.

Appeal from District Court, Silver Bow County; J. J. McHatton, Judge.

ACTION by J. J. York against J. M. Steward and another, doing business as the Smith Piano Company. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Reversed.

John W. Cotter, for Appellants.

Charles O'Donnell and *Francis Brooks*, for Respondent.

PIGOTT, J.—This is an action for rent alleged to be due upon a lease entered into between plaintiff and defendants on December 31, 1892, by the terms of which plaintiff let to the defendants the storeroom and first basement of a three-story brick building in Butte for the term of 12 months, beginning with January 1, 1893, at the monthly rental of $225 for the first six months, and of $250 for each month thereafter. Provision is made in the lease that, if the rent be not paid monthly in advance, the lessor may re-enter, and take possession, and, at his option, may determine the lease. It contains the usual covenants against waste or alteration by the lessees, but expresses no covenant whatever on the part of the lessor. Upon issues framed by the complaint, answer, and reply the cause was tried by jury. A verdict was rendered, and judgment entered for the plaintiff. From an order refusing a new trial, and from the judgment, defendants have appealed.

1. Much difficulty has been experienced in the effort to determine the exact ground upon which the defendants, in their first defense and counterclaim, intend to rely. The matters

there stated as constituting both a defense and a counterclaim are set forth in a manner so obscure, and with such disregard of the rule requiring conciseness and clearness, that a demurrer attacking the part of the answer now being considered, for want of certainty, as well as for ambiguity, would have been well interposed. Since, however, no objection was taken in the court below or here to the answer upon any ground whatsoever, we have examined the first defense and counterclaim as pleaded, and, after some hesitation, arrive at the conclusion that the pleader intended to aver, substantially, that, on, or just before, the execution of the lease, and while the defendants were negotiating with plaintiff therefor, plaintiff warranted that the building was in all respects suitable for the purpose of carrying on therein the piano and musical instrument business, in which defendants were engaged; that the basement would be ceiled, and put in good condition, and a new sidewalk laid; that defendants, relying upon these representations and warranties, entered into the lease, and in pursuance of the lease went into possession of the building, and placed their stock of musical instruments therein, and remained in possession until August 31, 1893; that the building was defectively constructed; that it was unfit for defendants' business, and that by reason of the defective construction of the plumbing and water fittings in the second story, which was occupied by and in the possession of plaintiff, the sinks and closets situated in the second story, and under the control of plaintiff, were allowed to overflow, and the water permitted to run down into the defendants' place of business, and upon defendants' merchandise, whereby the stock of goods was injured; that defendants repeatedly notified plaintiff of the defective condition of the plumbing and fittings in the building, but that plaintiff refused and neglected to remedy such defects, by which default plaintiff permitted a continuing nuisance to exist; that, because of the defective construction of the building, it was unfit for the use for which it was rented by the defendants, and was untenantable; and that by reason of the representations and warranties of the plaintiff as to the

condition of the building, and by reason of its unfitness for the purpose for which it was warranted by plaintiff, and by reason of the injury done by the water, defendants were damaged in their business in the sum of $250.

The first error assigned is the action of the court below in refusing to permit the introduction of evidence tending to prove an oral warranty of the condition of the building. The rule that, in the absence of fraud, accident or mistake, oral evidence cannot be admitted to alter, add to, or contradict the terms of a written contract, is so familiar that it would seem needless to cite authorities. This rule is applicable to evidence offered for the purpose of establishing an oral warranty, where, presumptively, the parties have reduced their entire contract to writing. (*Naumberg* v. *Young*, see Vol. 44 N. J. Law, 331, 43 Amer. Rep. 380; *McLean* v. *Nicol* (Minn.), 45 N. W. 15; *Snead* v. *Tietjen* (Ariz.), 24 Pac. 324. See, also, *Sanford* v. *Gates*, 21 Mont. 277, 53 Pac. 749; *Gaffney Mercantile Co.* v. *Hopkins*, 21 Mont. 13, 52 Pac. 561; *Mast* v. *Pearce*, 58 Iowa 579, 8 N. W. 632, and 12 N. W. 597; *Fisher* v. *Briscoe*, 10 Mont. 124, 25 Pac. 30; *Anderson* v. *Perkins*, 10 Mont. 154, 25 Pac. 92; *Stevens* v. *Pierce* (Mass.), 23 N. E. 1006; *De Witt* v. *Berry*, 134 U. S. 306, 10 Sup. Ct. 536; *Braly* v. *Henry* (Cal.), 12 Pac. 623.) The court, therefore, did not err in excluding all evidence having a tendency to show that plaintiff, contemporaneously with the making of the lease, or prior thereto, warranted by word of mouth the condition of the building, or promised to lay a new sidewalk, or ceil the cellar. Nor may defendants base their defense and counterclaim upon the breach of an implied warranty of fitness, for in the lease of a house there is no implication of warranty that the property is fitted for the use for which it is let, or that it is suitable for any purpose, or that it shall remain in a tenantable condition. (*Blake* v. *Dick*, 15 Mont. 236, 38 Pac. 1032; Gear on Landlord and Tenant, Sec. 99.)

Defendants insist, however, that, having pleaded fraud, concealment, and misrepresentation in the making of the lease, it was competent for them to show the actual condition of the

building, and its unfitness for the purpose intended. In answer to this contention it is sufficient to say that neither fraudulent misrepresentation nor concealment is pleaded. The answer, it is true, alleges that the plaintiff represented the building to be suitable, but it is silent as to whether or not the representation was fraudulently made. The averment that the representation was false is tantamount to saying that it was merely untrue. (*Budd* v. *Power*, 8 Mont. 380, 20 Pac. 820.)

Defendants assign as error the rejection of evidence which they say was offered for the purpose of proving that the building was so defectively constructed in respect of the plumbing, fittings, water-closets and sinks on the second floor, and in the possession of plaintiff, as to cause the water therein continually to overflow, and run down through the ceiling into defendants' storeroom, the effect of which was to deprive them of its beneficial enjoyment, to render it untenantable, and to injure their goods; and that plaintiff failed, refused and neglected to remedy the defect, although his attention was frequently called to it by the complaints of the defendants; and that by reason of the continuance of the nuisance defendants surrendered the demised property in August, 1893. That the evidence tendered and the offers of proof were as broad as defendants assume they were, is not perfectly apparent; but we are inclined to think that, when the pleadings and the whole course of the trial are considered, it may fairly be held that the evidence ruled out and the offers to prove comprehended, in substance, what is claimed by defendants.

Would the evidence offered and excluded tend to establish the violation by plaintiff of any agreement or promise on his part contained in the lease? The usual words of demise import a covenant for quiet enjoyment, which signifies that the tenant shall not be evicted by title paramount, and also that his possession shall not be disturbed by the acts or wrongful omissions of the lessor. Any sort of annoyance, unless, perhaps, a mere trespass, affecting the occupation of the property let, which prevents the tenant from enjoying it in as ample a manner as he is entitled to by the terms of the lease, amounts to

a breach. If the lessor disturbs the possession by an unlawful interference therewith, the lessee may, when sued for the rent, set up the damages arising from such disturbance as a counterclaim (*Hanley* v. *Banks* (Okl.) 51 Pac. 664; *McDowell* v. *Hyman* (Cal.) 48 Pac. 984); while at common law it seems he may recoup damages (*Mayor* v. *Mabie*, 13 N. Y. 151).

Treating the evidence which was offered as received, it appears that the plaintiff owned and was in possession and control of that part of the building immediately over the room let by him to the defendants; that the plumbing and fittings in such part of the house were defectively constructed; and that, by reason of the refusal of the plaintiff to remedy the defect, water overflowed the sinks and closets of the plaintiff, and ran down into the storeroom of the defendants to such an extent as to deprive them of the beneficial use of their tenement. We are satisfied that such evidence would, at least, tend to establish a constructive eviction, occasioned by the omission of the lessor to abate a nuisance, originating in, and continuing to exist upon, the property owned and controlled by him. Anything which is an obstruction to the free use of property so as to interfere with its comfortable enjoyment is a nuisance. (Compiled Statutes 1887, First Div. Sec. 361.) It is well settled that defective water pipes become a nuisance when carelessly maintained. (Wood on Nuisances, Sec. 124.) The landlord's acts or defaults may not amount to a physical eviction; nevertheless they may be of such character as to create or permit the continuance of a nuisance, "which, by preventing the reasonable use by the tenant of the premises, would affect directly the consideration of the contract between them." (*Sully* v. *Schmitt*, 147 N. Y. 248, 41 N. E. 514; *McDowell* v. *Hyman*, *supra*; *Kline* v. *Hanke*, 14 Mont. 361, 36 Pac. 454; *Marshall* v. *Cohen*, 44 Ga. 489.) If defendants, as tenants of the lower floor, were disturbed in their occupancy, or constructively evicted by the flowing of water from improperly constructed fixtures in a part of the building not let to them, but in the possession and under the control of plaintiff, the lessor, and the disturbance or eviction would not have resulted but for the omission of the lessor to remedy the defective con-

struction within a reasonable time after notice thereof, then the lessor, at least in the absence of excusing facts, has violated the implied covenant for quiet enjoyment. This is clearly common sense as well as the law; indeed, the supreme court of Georgia, in *Freidenburg* v. *Jones*, 63 Ga. 612, which case is approved in *Jones* v. *Freidenburg*, 66 Ga. 505, S. C. 42 Amer. Rep. 86, held that, "Where a tenant on a lower floor is injured by the flowing of water from the bathtubs and water fixtures situated above, he has a right of action against the landlord, if the overflow results from their improper construction; and this liability exists without reference to the occupation of the upper apartment by another tenant." But it is not necessary in the case at bar to approve or disapprove the doctrine there declared. *Blake* v. *Dick*, 15 Mont. 236, 38 Pac. 1070, is cited by plaintiff as controlling, but nothing decided in that case is inconsistent with the principles applicable to the question raised in the case before us.

For the error referred to, the motion for a new trial should have been granted.

2. During the trial the defendants asked leave to amend the answer by inserting an allegation to the effect that, owing to the negligent use of the upper story by the plaintiff and his tenants, the water fittings were allowed to overflow, and the water to run down, so as to render the store untenantable for defendants' purpose, or for any purpose. The request was denied. We perceive no error in the action of the court. It does not appear that defendants made any showing of the necessity to amend, nor was the amendment sought for the purpose of making the allegations correspond to the evidence already introduced. Some testimony had been received tending to prove that lodgers or tenants on the second floor had allowed water to overflow the sinks. But this evidence was received as one of the inducements for the alleged agreement for alteration or cancellation of the lease pleaded in the second defense, and not as supporting the averments constituting the first defense and counterclaim. It does not appear that the court abused its discretion in refusing the application, which was made during the progress of the trial.

3. The second defense is, in effect, that the plaintiff, on July 1, 1893, in consideration of the prevailing business depression, and of the untenantable construction of the demised property, and of the defective condition of the water sinks on the second floor of the building, entered into a new agreement with defendants, by which he let the property to them from month to month at a rental of $225 monthly, and that on August 1, 1893, defendants notified plaintiff that they would quit the premises on September 1, 1893, and that they were never in possession after August 31st, and that they paid all rents accrued to September 1, 1893. Plaintiff admitted that the rent was paid to September 1st, and that defendants vacated the property in August, and did not thereafter occupy it. Plaintiff denied that there was any agreement whatever to change the terms of the lease, and testified that because of the stagnation of business he voluntarily reduced the monthly rent for July and August from $250 to $225. The testimony upon this question was in substantial conflict The jury returned a verdict for the plaintiff in the sum of $846, and thereby necessarily found that the only change made in the lease was a reduction of the rent to $225 a month for the last half of the term.

Errors are also assigned upon the charge of the court and refusal of prayers for instructions relating to the second defense. Examination of the instructions given and of those refused has disclosed no reversible error. Some other matters of minor importance are specified as error, but, as they are not likely to arise again in the cause, their consideration is not deemed necessary.

Let the judgment and order appealed from be reversed, and the cause remanded, with direction to the district court to permit the defendants to amend the answer as they may be advised, and within such time and on such terms as may to the court seem proper. It is further ordered that appellants do not recover the costs incident to the appeal, and that each party bear such of said cost as were incurred by him.

Reversed and remanded.

HUNT, J., concurs. PEMBERTON, C. J., not sitting.

T. C. POWER, ET AL., APPELLANTS v. JACOB SWITZER, RESPONDENT.

21 523 | 24 17 | 21 523 | 32 67 | 21 523 | 39 388

[Submitted Oct. 25. Decided Nov. 7, 1898.]

Water Rights—Appropriation—Change of Use—Abandonment.

1. The diversion of water for domestic purposes in excess of what is required, and allowing such excess to overflow lands without any intention of irrigating, and without any intention of using such excess for any useful purpose, does not constitute an appropriation of the excess.
2. A lawful appropriation of water for a specified purpose gives the owner the right to change the use of his appropriation so long as it does not injure subsequent appropriators in their acquired rights.
3. In an action to quiet title to the right to use the waters of a creek, where the decree awarded plaintiff a prior right to a certain amount of the water which it was found he had appropriated, he cannot complain of the indefiniteness of a further provision therein awarding defendant the right to the use of all the remaining waters of the creek to the amount "necessary" to the use of his manufactory.
4. The evidence examined and held to sustain a finding of an abandonment of a water right.

Appeal from District Court, Lewis and Clarke County.

ACTION by T. C. Power and others against Jacob Switzer. From a judgment for defendant and an order denying a new trial, plaintiffs appeal. Modified.

Statement of the case by the justice delivering the opinion.

Action to quiet title to the right of use of the water of Uncle George's creek, in Deer Lodge county, and to enjoin defendant from diverting said water.

Plaintiffs allege ownership and possession of lots Nos. 41, 42, 38 and 39, in township 10 north, of range 6 west, embracing about 500 acres. Possession and use for pasture and growing of hay is alleged to have been in plaintiffs and their predecessors in interest since 1868, and water is alleged to be necessary for the proper and successful cultivation of the said lands. Plaintiffs aver that in 1868 they and their predecessors diverted and used all of the waters of Uncle Gerge's creek,

and conveyed them and have ever since used them upon said lands for agricultural, domestic and other useful and beneficial purposes, until July 17, 1893, when defendant, without right or title, appropriated and diverted all of the waters of Uncle George's creek.

Defendant admits the ownership and possession of the ground in plaintiffs and their predecessors since 1868, but denies that the lands require water for the cultivation of hay, grain or vegetables; denies that plaintiffs ever raised any crops except hay; denies that plaintiffs ever diverted or used any of the waters of Uncle George's creek to or upon the lands described, or that said lands are susceptible of irrigation from the waters of said creek; denies any wrongful diversion; and denies any necessity of the waters for agricultural or domestic purposes upon the land; and denies the allegations of injury. An abandonment of all right to the use of any of said waters is also set up in the answer.

It is also alleged by defendant that the lands do not need irrigation to be used for any purpose for which the plaintiffs or their predecessors have used them, and that neither plaintiffs nor their predecessors ever used the lands for any useful or beneficial purpose, except the raising of hay without irrigation. Defendant then sets up his ownership of a kaoline placer mining claim, and that ever since March 29, 1892, defendant has owned, occupied and used the same for the mining of clay and manufacture of brick and other articles of commerce; that on or about July 17, 1893, finding water necessary to be used in his said business, and the waters of Uncle George's creek being unappropriated, defendant diverted and used all of the waters of said creek to the land he owned for beneficial purposes, and on August 15, 1895, made an amended appropriation of the whole of the waters of said creek, and ever since has continuously used the whole of the said waters in and about his business. Defendant prays to be adjudged to be the owner of the right to the use of said waters, and for injunction against plaintiffs.

The replication denies abandonment, or that the lands do not

require irrigation for successful cultivation, or that defendant requires the use of said waters, or that he has any right or title to the same.

The court tried the case without a jury. Findings and judgment for defendant. Plaintiffs appeal from an order denying their motion for a new trial and from the judgment.

Walsh & Newman and *Carpenter & Carpenter*, for Appellants.

W. H. Trippet and *T. J. Walsh*, for Respondent.

HUNT, J.—After the testimony was heard upon the trial of the case, the learned judge of the district court went upon the land described in the statement of facts, and observed its character and the location of the water rights involved in the controversy. Afterwards findings of fact were made substantially as follows: That the lands are arid, near the top of the range of the Rocky mountains; that lots 41 and 42 were originally patented by the predecessors of the plaintiffs as gold placer claims, and were never used by the predecessors of plaintiffs for any other purpose than mining claims as long as they resided upon them; that in 1880 the plaintiffs acquired their interest in said lots 41 and 42; that in 1888 or 1889 the plaintiffs acquired the other lands mentioned in the statement of facts, and have occupied the same since then; that the plaintiff's predecessors never claimed any right or interest in the water rights in controversy, nor used any of said waters for any purpose whatever; that neither the predecessors of plaintiffs prior to the year 1880, nor the plaintiffs, ever used the said lands for any other purpose than for mining claims, except to cut a small amount of wild hay thereon; that said lands, by reason of their arid character and high elevation, are unsuitable for agricultural purposes, except for pasturing and wild hay, and that no amount of water used thereon will render them profitable for agricultural purposes; that no attempt has ever been made to use the lands for agricultural purposes other than for natural pasturage and wild hay; that

during the years 1868 and 1869 the predecessors of plaintiffs appropriated all the waters of Uncle George's creek by means of two ditches taken out within the boundaries of lots 41 and 42, the water from one ditch having been designed to furnish power to run a water wheel to pump a mining shaft used in a coal mine, and the other having been designed to convey water to one of the lots for placer mining purposes; that the first-mentioned ditch was built, and water diverted thereby, in 1869, and the second was begun in 1885, and completed in 1887, for placer mining purposes, but, said placer mining operations not proving profitable, they were abandoned, and the ditch was abandoned, and not used thereafter, and partially filled up, to make way for a brick plant erected by the plaintiffs, at or near the point where the water was used for placer mining operations; that the first mentioned ditch, in passing from its head to the coal shaft or water wheel, passes near a store and boarding houses and barns belonging to plaintiffs, and that the waters flowing in said ditch were not only used by plaintiffs in their coal mining project, but likewise furnished water to them for domestic purposes, but that in 1887 or 1888, when the coal mining operations were abandoned, the use of the water for such operations was also abandoned, although plaintiffs continued to use said waters for domestic purposes only; that from that time the water had been allowed to run to waste on the land below where boarding houses and store were situated, without special reference to any beneficial use, there being no attempt, by artificial means by plaintiffs, to convey the same over and upon any of said lands for purposes of irrigation or any other useful purpose; that none of the waters of Uncle George's creek have been used by the plaintiffs or their predecessors, except as has been mentioned, and except for domestic purposes; that the defendant and his predecessors, since 1867, have owned and occupied a tract of about 100 acres of ground, containing a clay valuable for mining purposes and the manufacture of brick, and that in such manufacture and mining considerable water is necessary; that on or about August 10, 1895, defendant diverted and appro-

priated for use, in connection with his brick plant, about 15 inches of water at a point about one and a half miles above the lands of these plaintiffs, and conveyed the same by a ditch to his brick plant for use therein; that, at the time of such diversion by defendant, plaintiffs had no use for any of said waters except for domestic purposes, and that defendant has been using the said water ever since; that Uncle George's creek during the dry season furnishes about twenty inches of water; that a constant flow of one inch is required by defendant for use in his brickyard; and that plaintiffs require for domestic purposes and for the use of stock a constant flow of not more than four inches.

The legal conclusions were that the plaintiffs are entitled to four inches of water at the point of use at all seasons of the year, for domestic purposes, prior in time and right to any use whatsoever on the part of the defendant; that the plaintiffs are not entitled to the use of any of the waters of Uncle George's gulch against the defendant for agricultural purposes; that the defendant, with the exception of the amount required by plaintiffs, is entitled to the use of all the waters of Uncle George's creek, or a sufficient amount thereof to give him a constant flow at his brick plant of not less than one inch, this right to be subject to plaintiff's prior right to the use of four inches for domestic purposes; and that plaintiffs and defendant are entitled to a decree and an injunction, one as against the other.

It is proper to notice an apparent inconsistency between two of the findings. In one the court found that the predecessors of plaintiffs never claimed any right or interest in the water right in controversy, nor used any of the waters for any purpose whatsoever, and subsequently also found that the predecessors of plaintiffs made certain appropriations in 1869, and that such rights were afterwards abandoned. In overruling the motion for a new trial, this apparent contradiction is explained by the judge, who says the particular part of the first paragraph above referred to has reference to 200 acres of land owned by the plaintiffs, and described as lots 38 and 39. ‘The orignal owners,'' says the judge in his memorandum

order, "of these 200 acres, designated as lots 38 and 39, never pretended to any claim of any kind to the water in controversy herein. The proof amply sustains this assumption, and it was the intention of the court to so find and so state. Words of reference, applying to lots 38 and 39, were omitted by oversight of the court or stenographer; but as this is the manifest meaning of the language used, the court does not feel warranted in trying the case a second time on this account." With this explanation on the part of the trial judge, the findings become perfectly consistent, and should be construed with relation to the particular lots of ground to which they severally apply.

The lands involved are within a mile or so of the western portal of the Mullen Tunnel, through which the Northern Pacific Railroad runs in crossing the summit of the Rocky Mountains, in Montana. At this great elevation and locality the seasons are too cold, and these particular lands too barren, to produce any crop at all except hay. These facts appear very clearly. It is also in evidence that the predecessors of the plaintiffs originally took out a water right in 1869 to be used for running a water wheel for a coal mine. The water thus used was afterwards diverted so as to flow by plaintiffs' store. Then, in 1885, these plaintiffs filed a claim of water right, and diverted water to a placer claim belonging to them, and known as the "Mullen Pass Placer Claim," and used the waters so diverted for placer-mining purposes. But, defendant's witnesses testify, the plaintiffs' mining operations ceased about 1888, and with their cessation all use of the waters was abandoned, except for domestic purposes about the store, boarding house, and stable. It is in evidence, though, that, after the water flows by the store and boarding house as described, it is allowed to run on down and upon a flat belonging to these plaintiffs, and being part of the lands described in their complaint. It there distributes itself, in its natural flow, over some four or five acres of ground, there being no artificial irrigation of this overflowed ground by means of any ditches at all. Plaintiffs contend that by this overflow and

distribution of water there were a number of acres of the land irrigated, and thus rendered more valuable for the purposes of raising hay, and that they acquired rights of use for agricultural purposes by this diffusion of water.

The question of abandonment of the use of any of the waters was one of fact, dependent upon the evidence of the conduct, acts, and intent of the parties claiming the usufruct of the water. Plaintiffs admit they never intended to use the water for mining, and under the evidence, it has been found they never intended to use it for agriculture. Their necessities were evidently merely for its use for domestic purposes, and any use of what was not consumed in those ways was a mere incident, brought about by the natural waste of water after it passed the point where it was utilized for domestic purposes, and was not the result of an attempt to cover the lands so as to make them more productive of hay or other crops. But the mere diversion of a quantity of water from a stream is not a legal appropriation of it. It has been a mistaken idea in the minds of many, not familiar with the controlling principles applicable to the use of water in arid sections, that he who has diverted, or "claimed" and filed a claim of, water for any number of given inches, has thereby acquired a valid right, good as against all subsequent persons. But, as the settlement of the country has advanced, the great value of the use of water has become more and more apparent. Legislation and judicial exposition have, accordingly, proceeded with increasing caution to restrict appropriations to spheres of usefulness and beneficial purposes. As a result, the law, crystallized in statutory form, is that an appropriation of a right to the use of running water flowing in the creeks must be for some useful or beneficial purpose, and when the appropriator, or his successor in interest, abandons and ceases to use the water for such purpose, the right ceases. (Sections 1880, 1881, Civil Code.) A man may divert more water than is necessary for domestic and culinary purposes, and permit the excess to flow on down to his lands; but if he has no intention of using such excess to irrigate the land upon which the excess so runs, and his purpose is not to raise a crop or run ma-

chinery, or to mine, or to otherwise apply it to a useful purpose, he acquires no valid right to such excess by the mere fact of a diffusion of waste water upon the grounds, even though they be susceptible of cultivation. The intention of the claimant is therefore a most important factor in determining the validity of an appropriation of water. When that is ascertained, limitation of the quantity of water necessary to effectuate his intent can be applied according to the acts, diligence, and needs of the appropriator. In this case the lower court has applied these established principles, and its findings, except as hereinafter stated, and conclusions, being justified by substantial evidence, must be sustained.

The decree adjudges plaintiffs to be entitled to the use of four inches of water, prior in right to any use whatsoever on the part of the defendant, "for domestic purposes only," and that plaintiffs are not entitled to the use of any water, as against the defendant, for agricultural purposes. It then awards defendant the right to use all the waters of the creek "to the amount necessary to the use of his brick manufactory, * * * subject only to the plaintiffs' prior right to the use of the four inches for the purposes aforesaid." Plaintiffs object to the restriction confining the use of water to "domestic purposes only." Now, under the law, if plaintiffs desire to change the use of their appropriation of four inches, they may do so, provided, always, they do not deprive subsequent appropriators of any rights acquired. They ought not, therefore, to be confined to the use of the water for domestic purposes only, but should be simply adjudged the owners of a right to the use of four inches of water prior to defendant's rights. It is true the court found that no amount of water could render the lands involved valuable for cultivation, but even if that were true, plaintiffs might desire to use their appropriation for other beneficial uses, and ought not to be prevented from so doing. The decree should, therefore, be modified by striking out the words which circumscribe plaintiffs' right of use. The finding of the court that no amount of water used on the lands of plaintiffs will render them profitable for agricultural purposes is not material to a decision of the case. We

believe, however, that the evidence does not sustain such a finding, inasmuch as it appears that hay has been and can be successfully raised upon the ground, if irrigated. The evidence upon this point was relevant, as bearing upon the question of the intent of plaintiffs; but whether or not the land may be made profitable for agricultural purposes is not directly involved in the suit, and no finding in respect to it was required.

Some contention is made that four inches is an insufficient quantity for the domestic uses of plaintiffs. This argument can hardly be seriously considered, when the great quantity of water represented by a steady flow of four statutory inches is estimated. It means about 2,800 gallons per hour.

Appellants also object to the part of the decree awarding respondent a right to the use of all the waters of the creek to the amount necessary to the use of his brick manufactory, subject to plaintiffs' prior right to the four inches aforesaid, and enjoining the plaintiffs from interfering with respondent's rights. The objection seems to be that the decree is indefinite. There is no error in this, however, which prejudices plaintiffs' rights, inasmuch as defendant is only given what water is necessary for his manufacturing business. Plaintiffs have got all they are entitled to under the evidence; so of what concern is it to them that defendant's use is not specifically limited by any number of inches? If defendant uses more than is necessary, the excess is subject to legal appropriation by plaintiffs or any one else; but, so long as plaintiffs have their rights adjudicated, they are not in a position to complain of the decree. Any rights which they may subsequently acquire are not affected in any way, for they are not litigated by this action.

The cause is remanded to the lower court, with directions to strike out the findings held to be immaterial, and to modify the decree in accordance with the views herein expressed. When so revised and modified, the order and judgment appealed from will be affirmed; each party to pay his own costs.

Modified and Affirmed.

PIGOTT, J., concurs. PEMBERTON, C. J., not sitting.

SARAH TROTTER, RESPONDENT, v. T. H. KLEINSCHMIDT, EXECUTOR, ETC., APPELLANT.

[Submitted Sept. 26, 1898. Decided Nov. 14, 1898.]

Appeal—Transcript—Time of Filing—Excuse for Delay.

That appellant was out of the state, his postoffice address being unknown to his family or counsel; that he had failed to furnish his counsel with necessary funds to procure a transcript; that he was not advised prior to his departure as to when the appeal was required to be taken; that his counsel was not advised of his intended departure; *held* not sufficient excuse for failure to file the transcript within the statutory time.

Appeal from District Court, Lewis and Clarke County.

PETITION by Sarah Trotter against T. H. Kleinschmidt, executor. From a judgment for plaintiff, and an order denying a new trial, the defendant appeals. Appeal dismissed.

Ashburn K. Barbour, for Appellant.

T. J. Walsh, for Respondent.

PER CURIAM.—The record in this case shows that the defendant, as executor of the estate of J. M. D. Greene, after probate of the will of said Greene, on the 27th day of January, 1896, filed his inventory, showing the receipt of $2,136. Thereafter the respondent filed her petition in the district court, asking for an order requiring the executor to file an additional inventory, including an amount of $3,947.70, which the respondent claimed the defendant had in his possession, and which it is alleged belonged to the estate. To this petition the defendant filed an answer, denying that the said last-named sum was the money of the estate, but claiming it as a gift from the deceased Greene. A trial was had upon the issues thus joined in the district court, and an order and decree was made requiring defendant to file an additional inventory as prayed for, including said amount of $3,947.70. This decree was rendered on November 3, 1897. On the 5th day of

March, 1898, the district court made an order denying the motion of the defendant for a new trial. On April 8, 1898, the defendant filed his notice of an appeal from the judgment, order and decree aforesaid to this court. No undertaking has ever been given in the case. On June 8th, no præcipe for a transcript of the case had been filed with the clerk of the district court, nor had a transcript been requested of or prepared by the clerk of said district court.

On that day the respondent filed her motion to dismiss the appeal for the reasons—First, "that more than sixty days have elapsed since the appeal herein was taken, and no transcript or record on appeal has been filed with the clerk of this court, as required by its rules;" second, "no undertaking on appeal has ever been made or filed herein;" third, "no appeal lies from the judgment and decree from which the appeal was taken;" fourth, "no notice of the appeal was ever served on either Willma Christena Trotter or James K. Smith, adverse parties." June 18th, thereafter, counsel for the appellant filed in this court an affidavit by which he seeks to excuse the *laches* of the appellant in failing to file a transcript of the case, as required by the rules of this court. This affidavit is to the effect that, at the date of filing of the notice of appeal in this case, the appellant was out of the state; that his whereabouts were unknown to counsel; that he was unable to ascertain his postoffice address; that the family of the appellant were unable to furnish the address of the appellant, further than that he was somewhere in the state of Idaho; that the appellant had failed to provide his counsel with the necessary funds to pay for and procure the transcript in the case; that the appellant was not advised as to when said appeal was required to be taken prior to his departure from the state; and that his counsel was not advised that the appellant anticipated going away so suddenly. The transcript was filed on the 25th day of August, although certified to by the clerk on the 4th day of that month.

This is the entire substance of the affidavit going to excuse the negligence of the appellant in preparing his transcript in

this case. We are of the opinion that the affidavit discloses no excuse, or pretense of an excuse, for the negligence of the appellant in preparing and filing in this court the transcript on appeal in the case. To excuse his negligence would be to say virtually that there could be no negligence which might not be excused by the court, and thereby render nugatory the statutes and rules governing appeals in this state. There is no pretense that the appellant did not know what the law and rules of court required him to do if he wished to prosecute an appeal to this court. The appellant, as far as there is any showing, seems to have absolutely ignored both statute and rules, and left the state without taking any steps whatever to prosecute his appeal. There is no excuse for such negligence.

Holding, as we do, that the negligence in failing to file the transcript in this case has not been excused or explained, it becomes unnecessary to treat the other reasons assigned for dismissing this appeal. The motion to dismiss the appeal is sustained, and the appeal is dismissed.

Dismissed.

STATE OF MONTANA, RESPONDENT, v. EVERTON T. PATCH, APPELLANT.

[Submitted Nov. 15, 1898. Decided Nov. 21, 1898.]

Forgery—Certificate of Deposit—Information.

1. An information charging the forgery of an endorsement of a certificate of deposit which was set out in full in the information and contained the words "H. D. & Co., Bankers" at the top and above the date and was signed "H. D. & Co." and was made payable to the order of the depositor, is sufficient, although no bank is referred to in the information, and there is no allegation therein of extrinsic facts to show that "H. D. & Co." had any bank in which the money was deposited. (Section 840, Penal Code.)
2. An information charging forgery of a certificate of deposit is not subject to demurrer because it alleges that the defendant forged and counterfeited the indorsement in the name of the payee therein with the intent to defraud him.
3. It is not necessary in an information for forging a certificate of deposit for the payment of \$60........ $\frac{}{100}$ Dollars, to allege extrinsic facts to show that it was a certificate of deposit for sixty dollars, where the exact sum deposited appears "\$60.00."
4. Section 3382 of the Code of Civil Procedure provides that a writing shown to and

proved by a witness must be read to the jury before the testimony of the witness is closed: *Held* that, where it appears that a written instrument was testified to and was admitted in evidence, the presumption is, in the absence of evidence to the contrary, that the contents of the paper were read to the jury.

Appeal from District Court, Deer Lodge County; Theo. Brantley, Judge.

B. S. Thresher, for Appellant.

C. B. Nolan, Attorney General, for the State.

HUNT, J. Defendant Patch was convicted of forgery. He appeals from the judgment of conviction and from the order of the district court overruling his motion for a new trial. The charging part of the information is as follows: "The said Everton J. Patch, on the 12th day of July, 1897, at the county of Deer Lodge and state of Montana, did upon the back of a certain certificate of deposit and writing obligatory for money, of the tenor following: 'Certificate of Deposit, $60.00. No. 58,344. Hoge, Daly & Co., Bankers, Anaconda, Mont., May 11, 1897. Edw. Dugan has deposited in this bank sixty.... $\frac{}{100}$ dollars, payable to the order of self, duplicate unpaid, on the return of this certificate properly indorsed. This deposit is not subject to check. Hoge, Daly & Co.,'—falsely and feloniously make, forge, and counterfeit an indorsement and assignment thereon in the following words, 'Edward Dugan,' the name of the payee in said certificate of deposit and writing obligatory, with intent then and there to defraud Edward Dugan; and the said Everton J. Patch, then and there having in his hands and possession the said certificate of deposit and writing obligatory, and on the back of which was the said false, forged, and counterfeit indorsement and assignment as aforesaid, did then and there, well knowing the said indorsement and assignment to be false, forged, and counterfeit, utter, pass, and publish the same as true and genuine, with intent to defraud the said Edward Dugan, contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the state of Montana."

1. A general and special demurrer was interposed. This was overruled. It is said that the instrument described in the information, if standing alone, is invalid for any purpose, in that no bank is referred to in the pleading, and that the name of "Hoge, Daly & Co., Bankers," at the top of the instrument, is no evidence that such a firm owned a bank in which the money described was deposited, or that Hoge, Daly & Co. "had any right to receipt for money deposited in this particular bank," and that, without allegations of extrinsic facts to show the relation between Hoge, Daly & Co. and the bank mentioned in the instrument, the information is wholly defective.

Under the statute (Section 840, Penal Code), every person who, with intent to defraud another, falsely makes, alters, forges or counterfeits any indorsement of any bill of exchange, promissory note, draft, order, * * * writing obligatory, or promissory note, for money or other property, etc., is guilty of forgery.

On its face this instrument appeared to be a valid certificate of deposit, which is a receipt of a bank or banker for a certain sum of money received upon deposit, generally framed in such a form as to constitute a promissory note, payable to the depositor, or to the depositor or order, or to bearer. (Daniel on Neg. Inst. Section 1698.) It was expressed in negotiable words. It was a negotiable paper on its face, and clearly was brought within the definition of the instruments or writings made the subjects of forgery under the statute of the state. That being so, it was sufficient to set it forth as it was in the information, and no extrinsic facts were required to be averred. The doctrine of the case of *State* v. *Evans*, 15 Mont. 539, 39 Pac. 850, is that, to constitute forgery, the forged instrument must be one which, if genuine, may injure another, and that it should be apparent from the information that such is its legal character, either from recital or description of the instrument itself, or, if that does not show it to be so, then by averment *aliunde* showing it to be of such a character. That case is inapplicable, so far as appellant relies upon it to

uphold his argument that in the present information averments of extrinsic matter are essential, while it affirms our opinion that the description of the instrument itself involved in this case, including indorsements, is sufficiently set forth in the information.

It is also urged that the information is bad because it alleged that defendant passed the instrument with the indorsement thereon with the intent to defraud Edward Dugan, the payee named therein. The evidence goes to show that defendant furtively took the certificate from the person of Dugan, its owner, taking advantage of the drunkenness of Dugan while the latter was in his room at an hotel; that within a few hours thereafter he went to the bank of Hoge, Daly & Co., in Anaconda, presented the certificate to be cashed, and, in response to questions put to him by a clerk of the bank, represented himself to be Edward Dugan, the payee, indorsed the certificate, and so obtained the money due thereon. This was sufficient to warrant the jury in finding an intent to defraud Dugan. From the intent to pass the paper as genuine the law draws the conclusion of the intent to defraud whatever person may be defrauded. Section 598, paragraph 4, 8th Ed., Vol. II, Bishop's New Criminal Law, says: "Ordinarily there are two persons who legally may be defrauded,—the one whose name is forged, and the one to whom the forged instrument is to be passed. Therefore the indictment may lay the intent to be to defraud either, and it will be sustained by proof of an intent to pass as good, though there is shown no intent in fact to defraud the particular person." Fraud need not be actually perpetrated in forgery. The essence of the crime is the making of the false writing with the evil intent that the instrument forged shall be used as good. (*People* v. *Turner*, 113 Cal. 278, 45 Pac. 331; *Bennett* v. *State*, 62 Ark. 532, 36 S. W. 947; *Com.* v. *Henry*, 118 Mass. 460; *People* v. *Ferris*, 56 Cal. 442.) And from the intent to pass the certificate as good the law infers a purpose to defraud a person who may be prejudiced. (*Vide* cases cited and *State* v. *Cleveland*, 6 Nev. 181; Hocheimer, Cr. Law, Section 651.)

2. There is a contention that the instrument is so uncertain on its face, because of the form "sixty......$\frac{}{100}$ dollars," that the pleading of extrinsic facts was required to show that it was a certificate of deposit for sixty dollars, rather than one for sixty hundred dollars or six thousand dollars, and that the special demurrer was well founded on this ground. We are disposed to hold that no one would be misled in reading the amount of such a certificate, even independently of more certain writings in the instrument itself, and that it is but a common form of bankers' certificates, where the $\frac{}{100}$ is the denominator of any fractional part of a dollar perchance deposited by the payee; but in this instance the exact sum deposited is apparent and certain by the figures "$60.00" in the upper left hand corner of the certificate, so that no possible ambiguity is apparent, and the demurrer was properly overruled.

3. The record discloses that the certificate of deposit was offered in evidence before the jury and admitted, but fails to show affirmatively that it was read to them. Appellant says that it ought to have been read, under Section 3382, Code of Civil Procedure, which provides that a writing shown to and proved by a witness must be read to the jury before the testimony of the witness is closed, and that in the absence of a showing that it was read, no presumption obtains that the jury could or did read the paper. The fact appears, however that the paper was testified to and was admitted in evidence, and we hold that, unless the contrary is affirmatively shown, it is to be presumed that it was read to the jurors, as contemplated by the law and the usual practice of trial courts.

4. We shall not dwell on the final contention of appellant, that the verdict is against the evidence, except to state that the testimony of the state made out a complete offense of forgery, and fully established defendant's guilt. We find no error in the record. The judgment and order appealed from are affirmed.

Affirmed.

PEMBERTON, C. J., and PIGOTT, J., concur.

21 539
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25 143
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BUTTE & BOSTON CONSOLIDATED MINING COMPANY, APPELLANT, *v.* MONTANA ORE PURCHASING CO., RESPONDENT.

[Submitted Sept. 29, 1898. Decided Nov. 21, 1898.]

Corporation—Manager, Authority of—Presumption—Burden of Proof—Mining Claims—Tenants in Common—Interlocutory Injunction—Discretion—Practice.

1. CORPORATION—*Manager, Authority of—Presumption—Burden of Proof.*—Corporations are bound only by the acts and contracts of their agents within the scope of their authority. There is no presumption that the general manager of a corporation has authority to grant a right of way over land belonging to it; and the burden of proving such authority is upon him who asserts a right to the easement.
2. MINING CLAIMS—*Tenants in Common—Injunction.*—Under Sec. 592, Code of Civil Procedure, which provides that if any person shall assume and exercise exclusive ownership over, or take away, any property held in tenancy in common, the party aggrieved shall have his action for the injury in the same manner as if such tenancy in common did not exist, a tenant in common of a mining claim may enjoin his cotenant from maintaining a tramway over the claim.
3. INTERLOCUTORY INJUNCTION—*Discretion.*—Although the granting or refusing an interlocutory injunction is a matter within the discretion of the lower court, the appellate court will reverse an order where there has been an abuse of discretion.
4. SAME—*Practice.*—Upon the hearing of an application for an injunction (or for dissolving an order granting an injunction) the plaintiff may use in support of his application affidavits and oral testimony.
5. SAME.—Where a temporary restraining order was dissolved on insufficient evidence, the court, on appeal, will not direct the trial court to leave such order in force, but will order a new hearing.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

ACTION by the Butte & Boston Consolidated Mining Company against the Montana Ore Purchasing Company to enjoin the maintenance of a tramway. From an order dissolving a temporary restraining order, and refusing an injunction *pendente lite*, plaintiff appeals. Reversed.

Wm. H. De Witt, *John F. Forbes* and *Louis Marshall*, for Appellant.

Clayberg & Corbett and *J. J. McHatton*, for Respondent.

Pigott, J.—This appeal is from an order made April 6, 1898, dissolving a temporary restraining order theretofore granted on the application of the plaintiff, and refusing the plaintiff an injunction *pendente lite* against the maintenance by the defendant of a tramway.

1. Plaintiff and defendant are owners in common of the Snohomish lode mining claim. Defendant has constructed a tramway over a portion of the claim, and uses it for the purpose of conveying ores from the Rarus mine to a bin built by defendant on the common property. The Rarus mine is owned by the defendant, as are also the tramway and ore bin. This tramway and bin are used by the defendant alone, and cannot be utilized by plaintiff in its mining operations. In the event plaintiff desired to erect works, it could not do so on that part of the claim over which the tramway runs. Plaintiff insists that the tramway and bin were placed upon the common property wrongfully, and without its consent or the consent of its predecessor in interest; while the defendant pleads that the structures were erected with the consent of the grantor of plaintiff. To sustain the allegation that the tramway and bin were built upon the property with the consent of the plaintiff, defendant introduced in evidence certain correspondence between one Palmer who was general manager of the Butte & Boston Mining Company, the immediate grantor of the plaintiff, and the defendant. If Palmer was clothed with the power to confer upon the defendant a right of way for the tramway, the question would be presented as to whether or not the route agreed upon was followed by defendant in laying the tramway. We find it unnecessary, however, to determine the latter question, since we are of the opinion that Palmer was not, in virtue of his office as general manager, authorized to grant for his company either an easement or a license. In the late case of *Great Falls Water Works Co.* v. *Great Northern Ry. Co.*, 21 Mont. 487, 54 Pac. 963, we declined to express an opinion upon the question now presented. But we think there can be only one answer made: Corporations, like natural persons, are bound only by the acts and contracts of their agents done

and made within the scope of their authority. There is no presumption that the general manager of a corporation has power to convey its lands, or to grant an easement or give a license therein. (See *Walrath* v. *Champion Mining Co.* (May 23, 1898), 18 U. S. Sup. Ct. 609; *Kipp* v. *Coenan*, 55 Iowa 63, 7 N. W. 417; *Stow* v. *Wyse*, 7 Conn. 214; *Leggett* v. *The New Jersey Mfg. & Bkg. Co.*, 1 N. J. Eq. 541.) The defense so interposed rests upon the acts of the general manager of the corporation which conveyed the land to plaintiff; and the burden was upon defendant to show that he had the authority to grant the right of way over, or to permit a license to be exercised on, the property. The failure of defendant to prove that such power had been lodged in the general manager makes further discussion of this defense unnecessary.

2. Inspection of the record discloses that in all substantial matters the defendant in this case is in the attitude and position of the defendants in *Connole* v. *B. & M. Con. Copper and Silver Mining Co.*, 20 Mont. 523, 52 Pac. 263; and the facts shown by the record before us so closely resemble those presented in the case cited as to demand the application of the same rules. We held in the Connole case that the court below did not abuse its discretion in granting a temporary injunction upon facts similar to those presented in the case at bar, and that, under Section 592 of the Code of Civil Procedure, the acts of the defendants constituted an assumption and exercise of exclusive ownership over a portion of the property owned in common by them and the plaintiff, and that injunction, being an appropriate remedy as against a stranger, was properly granted against the defendants for the purpose of restraining the continuance of such trespass, and thus to prevent a multiplicity of actions at law to recover damages which would be occasioned thereby. The repetition of the trespass would render defendants liable to continued actions, in which the amout of recovery would be the damage sustained by the plaintiff up to the time of the commencement of each action. (*Pappenheim* v. *Metropolitan Elevated Railway Co.*, 128 N. Y. 436, 28 N. E. 518.) The doctrine which was declared applicable

to the facts in the Connole case is controlling in the case now before us.

Defendant claims, however, that the granting or refusal of an interlocutory injunction is a matter within the discretion of the lower court, and that, therefore, this court will not, on appeal, interfere with the exercise of that discretion. Ordinarily, the rule is as stated, for it is well established that the action of the court or judge below in granting or denying an injunction will be affirmed unless error clearly appears. But it is also well settled that the appellate court will not hesitate to reverse an order granting or denying an injunction if the court or judge *a quo* has abused its or his discretion. As was said in *Shilling* v. *Reagan*, 19 Mont. 508, 48 Pac. 1109, by discretion in such cases is meant a sound judicial discretion—not an arbitrary one, nor a discretion exercised contrary to the law applicable to the facts proved. In this case the right to an injunction pending the controversy was shown on the hearing, and, indeed, the district court in effect so decided, although it denied the injunction upon the wholly untenable ground that an injunction would throw out of employment a large number of men then working in the Rarus mine.

3. A question of practice has been suggested. The temporary restraining order was granted without notice to the defendant, and the order to show cause why an injunction *pendente lite* should not be issued was heard with the application of defendant to dissolve the restraining order. The application of the defendant to dissolve was supported by affidavit. The court received oral testimony upon the hearing, but declined to consider affidavits on the part of the plaintiff in opposition to the application by defendant, the reason given by the court being that, under Sections 875, 877 and 878 of the Code of Civil Procedure, plaintiff was permitted to oppose the application to dissolve either by affidavit or oral testimony, but not by both, and that, as plaintiff had introduced oral testimony, it would not be allowed to use an affidavit. To dispose of this matter, it is sufficient to say that plaintiff was not limited to the right to use one only of the two sorts of evi-

dence recognized as admissible by the sections cited, and the fact that it had seen fit to avail itself of oral testimony was no reason for excluding evidence in the shape of written testimony. Since the application to dissolve was supported by affidavit, the plaintiff had the privilege of presenting all evidence at his command in opposition to the application, whether such evidence was oral or written, and the statute is not susceptible of the interpretation which the court below gave it.

We are urged by the plaintiff to direct the district court to leave the temporary restraining order in force, and to continue it until the final trial of the cause. But we do not know what might be shown on a new hearing in the court below (if one he had), and the suggestion, therefore, does not seem to us to be one which should be adopted.

Upon the evidence adduced at the hearing, plaintiff was entitled, as a matter of law, to a temporary injunction. If plaintiff renews its application for a temporary injunction, the court below is advised to hear the same upon the evidence already received at the former hearing, supplemented by such further proofs as either party may adduce. The orders appealed from are reversed, and the cause is remanded for further proceedings by the district court not inconsistent with the views expressed in this opinion.

Reversed and remanded.

PEMBERTON, C. J., and HUNT, J., concur.

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s21	505
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22	225
22	242
22	243
22	377
22	382
22	433
22	435
22	439
21	544
s23	126
21	544
24	105
s24	149
21	544
30	188
e30	260
30	505
21	544
s29	399
29	401
s29	404
e29	409
29	447
d29	458

JAMES FORRESTER AND ANO., APPELLANTS, v. BOSTON & MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY, ET AL., RESPONDENTS.

[Submitted Sept. 28, 1898. Decided Nov. 28, 1898.]

Corporations—Disposition of Assets—Consent of Stockholders—Remedy—Injunction—Preliminary Order—Laches—Waiver—Mining.

1. The directors of a corporation organized another corporation in another state, and transferred the entire property of the former to it, in consideration of the second corporation delivering its entire stock to the former, and assuming its liabilities. Having obtained the consent of the holders of more than three-fourths of the stock of the first corporation to such transfer, they executed another conveyance, in confirmation of the first, and delivered possession to the new company. They then obtained an irrevocable power of attorney from the holders of three-fourths of the stock, authorizing such stock to be voted in favor of a ratification of the transfer, called a stockholders' meeting to ratify such transfer, and a protest against it by minority stockholders was disregarded. *Held*, that minority stockholders were entitled to enjoin ratification of the transfer without proof that they had without avail exhausted their remedies within the corporation.
2. The ratification by a majority of the stockholders of an illegal and incomplete transfer of the corporate property may be enjoined by stockholders who acquired their stock after such transfer was made.
3. The determination of questions of fact on motion for preliminary injunction will not be disturbed on appeal, unless clearly against the evidence.
4. The fact that minority stockholders of a corporation waited until the day preceding the time set for the ratification by a majority of the stockholders of an illegal and incomplete transfer of the corporate property before suing for injunction was not *laches*.
5. Nor was it a waiver of their rights.
6. An injunction *pendente lite* to restrain majority stockholders of a corporation from ratifying an illegal transfer of the corporate property, and one that is *ultra vires*, made by the officers and directors, will not be refused because the corporation offers a bond; since a stockholder is entitled to restrain the illegal transfer of the corporate assets as of right.
7. At common law the directors or a majority of the stockholders of a prosperous corporation able to achieve the objects of its creation cannot sell or otherwise dispose of all the property without the consent of all the stockholders.
8. Compiled Statutes 1887, Div. 5, Secs. 492-494, providing that the officers of a mining corporation shall have no power "to sell * * * or otherwise dispose of" the whole or part of its mining grounds, mills and plant, without such transfer being first approved by the holders of two-thirds of the stock, at a meeting at which at least three-fourths of the stock is represented, and that, if such sale be of the entire corporate property, the corporation shall be dissolved, is merely a limitation of the common-law powers of directors and majority stockholders of corporations, and does not authorize two-thirds of the stockholders of a prosperous corporation to sell all of its property against the protest of any other stockholder.
9. Conceding that said provisions enable a prosperous corporation to sell all its property

without the unanimous consent of the stockholders, they do not authorize either a disposal thereof without a pecuniary consideration, or an exchange,

10. A transfer of all the property of a corporation to a foreign corporation organized by the directors of the former to acquire its property, in consideration of the latter assuming the liabilities of the former, and agreeing to deliver to it its entire capital stock, stockholders of the former to exchange their stock for shares in the new corporation, or in lieu thereof to receive a fixed sum per share for surrendering them, is neither a sale nor an exchange, within said provisions, conceding a sale or exchange to be authorized thereby.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

ACTION by James Forrester and another against the Boston & Montana Consolidated Copper and Silver Mining Company and others for injunction. From an order granting an injunction *pendente lite*, defendants appeal. Affirmed.

Statement of the case by the justice delivering the opinion.

Appeal by defendants from an order granting a temporary injunction restraining them from voting, or allowing to be voted, any of the capital stock of the Boston & Montana Consolidated Copper and Silver Mining Company, of Montana, in favor of disposing of the property of the said corporation to a corporation of the same name organized under the laws of New York, and from ratifying or adopting any deed of conveyance of the said property theretofore made in the name of the Montana corporation to the New York corporation, or any act of the board of directors with reference to such transfers. This action was brought by plaintiffs in their own behalf, as well as in behalf of such other stockholders of the Montana corporation as are similarly situated, and desire to join them.

From the record we gather the following facts: The Boston & Montana Consolidated Copper and Silver Mining Company (hereinafter called the "Montana Company") was organized under the laws of Montana, in 1887, as a mining and smelting corporation. It has a capital stock of 150,000 shares of the par value of $25 each. The business in which it is engaged has been successfully carried on, its net income for 1897

being in excess of $3,000,000, of which $1,800,000 were distributed among the shareholders. Its property is valued at $30,000,000, and its debts are insignificant in amount. The stockholders number 1,877, and of these but a very few reside in Montana, the great majority living in the eastern states and in Europe. While the practical mining and smelting operations have been conducted in Montana, the financial business of the company has been transacted in New York and Massachusetts, as the only markets for its product are in those states. The directors have always resided there, and it is inconvenient for them to hold frequent meetings in Montana. It is also impracticable for the stockholders to attend meetings which are required to be held in this state. The statute requires the transfer books to be kept in Montana. For many years the stock of the company has been daily bought and sold in Boston and New York, and, unless the transfers are entered upon the books of the company, they are, for some purposes, invalid. The directors, on April 5, 1898, caused to be incorporated, under the laws of New York, the Boston & Montana Consolidated Copper and Silver Mining Company, of New York, with the same capital stock as that possessed by the Montana company, divided into the same number of shares, and of a like par value; and on April 6, 1898, the directors of the Montana company executed, in the name of the company, a conveyance to the New York company of all the property owned by the Montana company, the consideration expressed being the assumption by the New York company of all the liabilities of the Montana company, and the delivery by the New York company of its entire capital stock to the Montana company, to be exchanged for stock held in the Montana company by those holding shares therein, share for share; or, at the option of the stockholders, the New York company was to pay such of them as did not transfer their shares for stock of the new company the sum of $130 a share. On May 31, 1898, the directors, having obtained the written consent of those owning 131,036 shares of the Montana company, executed and delivered a like conveyance to the New York com-

pany in confirmation of the deed first executed, the considerations being the same as those inducing the transfer of April 6th, with the exception that the New York company agreed to pay $170 instead of $130 for each share not exchanged.

The New York corporation is in possession of the property attempted to be transferred. On April 6, 1898, the directors of the Montana company mailed to each of the stockholders a copy of a notice calling for a meeting of the stockholders on June 6, 1898, in Butte, Mont., for the purpose of acting upon the proposition to sell all the assets of the Montana company, and for the purpose of ratifying or rejecting the action of the directors in disposing of the property of the corporation. The notice was also duly published in a newspaper for six weeks prior to June 6, 1898.

The plaintiff Forrester, on April 8, 1898, purchased 100 shares of the stock of the Montana company; and on May 16, 1898, the plaintiff Maginnis purchased a like number of shares. Neither the former owners of these shares so purchased, nor the plaintiffs, in any wise consented to the transfers made by the directors in the name of the Montana company. Two days before the meeting called by the notice, plaintiffs, having served a formal protest against the attempted transfer and its intended ratification, brought this action.

On June 6, 1898, the stockholders convened and organized. There were presented at the meeting, by certain of the individual defendants, proxies from the holders of 131,036 shares of the capital stock, authorizing the holders of the proxies to vote in favor of the ratification of the transfer theretofore made to the New York company.

Upon the hearing of the order to show cause why an injunction *pendente lite* should not issue, the defendants offered a bond in the penal sum of $50,000, conditioned, in substance, that if the defendants shall, when requested by plaintiffs, purchase from them the 200 shares mentioned at the market price thereof, and pay any damages that might be sustained by them because of any action that may be taken at the meeting of the stockholders of the Montana company pursuant to the notice

heretofore referred to, the obligation should be void, but otherwise to be in force. The defendants further offered to execute a bond in such form, or with such conditions, in such amount, and with such sureties, as the court might designate, in lieu of the bond so offered, if it were deemed in any wise insufficient. The court declined to accept such bond, and granted the injunction order appealed from.

John F. Forbis, *Louis Marshall* and *Wm. H. DeWitt*, for Appellants.

Robert B. Smith, *J. J. McHatton* and *Clayberg & Corbett*, for Respondents.

PIGOTT, J.—We shall discuss briefly such of the points made by the defendants as seem worthy of serious attention.

1. Defendants argue that the failure of plaintiffs to state and prove that they have exhausted their remedies within the corporation is fatal to the maintenance of the action. The point is without merit. Sufficient appears to show, with reasonable certainty, that plaintiffs could not hope to obtain within the corporation itself redress of their alleged grievances. The board of directors had not only executed a deed in the company's name to all its property, but had also procured the ratification and express approval of such act by stockholders owning 131,036 shares of its stock. The directors obtained also the consent in writing of these stockholders to the making and delivery of the confirmatory conveyance of May 31st. They called the meeting of June 6th, at which the proposition to ratify the things done by them was to be submitted to the stockholders; and they held irrevocable powers of attorney executed by owners of the number of shares mentioned, running to defendant Bigelow, who was president of the company, authorizing, and, indeed, it would seem, directing, Bigelow or his substitutes to vote in favor of the ratification of, and consent to, the sale theretofore made by Bigelow and the other directors in the name of the Montana company. Admission is made by defendants that the

directors caused the New York company to be organized, to the end that it might take the place of the Montana company, and for the purpose of transferring the property of the latter-named company to the former. The further admission appears that the stockholders whose proxies were held by Bigelow, or his substitutes as attorneys in fact, were desirous of voting in favor of the transfer; and that the 131,036 shares would have been so voted but for the injunction is established beyond doubt. The protest of plaintiffs, made just before suit was begun, against the action of the directors, and against the proceedings proposed to be taken at the meeting of June 6th, was unavailing; and the answer is framed upon the theory that the objection by plaintiffs to the action taken by the directors, and any protest against that intended to be taken, would have been disregarded by the holders of 131,036 shares, as well as by the directors. The law, which does not demand a request that a person or corporation sue him or itself, nor require the doing of any useless thing, as prerequisite to the accrual of a right of action, will therefore, in the circumstances here existing, permit the plaintiffs to maintain suit to undo or prevent the acts of directors or stockholders performed or threatened to be performed, if such acts be, as to plaintiffs, *ultra vires;* and this is within the principles declared in *Gerry* v. *Bank*, 19 Mont. at page 199, 47 Pac. 813; *Ashton* v. *Dashaway Association*, 84 Cal. 61, 22 Pac. 660, and 23 Pac. 1091; *Botts* v. *Ry. Co.*, 88 Ky. 54, 2 L. R. A. 594, 10 S. W. 134; *Smith* v. *Dorn*, 96 Cal. 73, 30 Pac. 1024; *Barr* v. *Pittsburgh Plate Glass Co.*, 40 Fed. 412; and in conformity with the rule laid down in Pomeroy on Equity Jurisprudence Sec. 1095; *Albers* v. *Merchants' Exchange*, 45 Mo. App. 206; 4 Am. and Eng. Ency. Law, 280; 27 *ib.* 396; 4 Thompson on Corporations Sec. 4521.

2. Another contention of defendants is that the action must fall because the complaint fails to aver that plaintiffs were owners of their shares at the time of the transactions of which they complain. This point is also without merit. The cases cited by defendants in support of their position are not

pertinent. Equity rule 94, promulgated by the Supreme Court of the United States, provides that "every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action;" and the federal authorities relied upon are to a great extent based upon that rule, which, of course, is not binding upon the state courts. (*Parsons* v. *Joseph*, 92 Ala. 403, 8 South, 788.) The other citations are for the most part, if not wholly, of cases in which the stockholders sued to recover for wrongful *intra vires* acts of the officers of corporations, or to obtain an accounting in respect thereto, performed before the plaintiffs in those cases became shareholders. We deem it unnecessary, however, to inquire whether, in the respect stated, rule 94 is but declaratory of an equity doctrine; for in the case at bar defendants recognize and admit that the transfer is not yet legally consummated, and that, to bring about the desired result, not less than two-thirds of the stock must be voted in favor of the transfer, at a meeting called for that purpose. The vote has not been taken. To prevent such an attempted ratification or authorization of the proposition submitted as would result from the voting of the shares at the meeting, is the object sought to be obtained by the injunction.

3. Defendants insist that the 200 shares standing in the names of plaintiffs were acquired by and for the use of the Montana Ore Purchasing company, a rival corporation, between which and the Montana company an unfriendly feeling

exists, and many actions are pending, and of which one plaintiff is attorney, and the other vice president; that the action is not in good faith, but was brought from improper motives, and in the interest of the rival corporation, and not for the benefit of the nonassenting stockholders, and that, for this reason, plaintiffs are not entitled to be heard in a court of equity. The court below found that plaintiffs owned the shares, and that they were acting in good faith; and we cannot say that the evidence received on the hearing so clearly proves the contrary as to warrant us in deciding that the lower court erred in determining the question as it did. On the hearing of the application for the injunction *pendente lite*, the matter was one peculiarly within the discretion of the court below. Consideration of the elaborate and ingenious argument of defendants discussing the effect of bad motives upon the right to maintain the suit is thus rendered unnecessary; and we do not decide whether or not an injunction ought to be refused against a private corporation in a suit brought by an individual stockholder in the interest of a rival corporation.

4. It does not appear that plaintiffs were guilty of unreasonable delay or laches in commencing suit. They instituted proceedings prior to the day on which the stockholders were to meet for the purpose of voting in favor of the transfer theretofore made, or attempted to be made, by the directors; and it is evident that the suit brought to protect whatever rights plaintiffs may have was timely. (*Mills* v. *Central Ry. Co.*, 41 N. J. Eq., 1, 2 Atl. 453.) The law did not require them to act before they did, and they have inflicted no legal injury upon defendants, nor have they slept upon their rights for such length of time as might raise the inference of a waiver.

5. The court did not err in refusing to accept the bond or undertaking tendered by defendants. (See Cook on Stock and Stockholders, Sec. 502; *Stevens* v. *Rutland R. R. Co.*, 29 Vt. 545; *Railroad Co.* v. *Collins*, 40 Ga. 582; *Tomkinson* v. *Southeast R. Co.*, 35 Ch. Div. 675; Thompson on Corporations, Sec. 345.) Section 876 of the Code of Civil Procedure confers upon the court a dis-

cretionary power to vacate an injunction granted *ad interim* or *pendente lite*, where the alleged wrong or injury is reparable and capable of being adequately compensated for in money, upon defendant's executing such an undertaking as the court may require. We do not think the court abused its discretion. As counsel well say, if plaintiffs were clearly entitled to an injunction in this case, the district court would not have been justified in accepting an undertaking in lieu of the injunction, which would be licensing the commission of a wrong not susceptible to compensatory damages. Although the present value of the shares held by plaintiffs may be accurately determined by a judgment, and the profits by way of future dividends on their shares that might accrue from the Montana company predicted with approach to reasonable certainty, yet, if the transfer and the vote of the shareholders in attempted ratification thereof be *ultra vires* as to them, then it is manifest, upon the plainest principles of law, that no court may rightly compel them to dispose of their shares *in invito*. (*Tompkinson* v. *Railroad Co.*, *supra*; Beach on Injunction, Secs. 295, 296; *Mills* v. *Railroad Co.*, *supra*.) If, as matter of law, the proposed transfer was shown to be *ultra vires* the corporation, plaintiffs were entitled, as of right, to the injunction; and in such event, were a bond accepted and injunction refused, the fact would seem apparent that the court had decided that plaintiffs' property could not be taken without their consent, and at the same time had permitted it to be done,—an inconsistency needing no comment.

6. Having disposed of the foregoing contentions of defendants, we may state the facts of the case now presented as follows: The Montana company is a solvent and prosperous private corporation, whose business is in a flourishing condition. Its directors have attempted to transfer, by conveyances in its name, all its assets to a foreign corporation, without capital or assets, organized for the sole purpose of acquiring the property and conducting the business of the Montana company. In consideration of such transfer, the directors of the Montana com-

pany have agreed to accept all the capital stock of the foreign corporation, for distribution among those stockholders of the Montana company who may desire to exchange their shares for a like number of shares in the new company, and to those not willing to exchange the New York company agrees to pay $170 per share. To this transfer, stockholders owning more than three-fourths of the shares have consented. Plaintiffs own 100 shares each, and do not consent. A special meeting of the stockholders of the Montana company was called for the purpose of voting upon the proposed ratification of the acts of the directors, and of approving or disapproving such transfer of all the property. The court, on application of plaintiffs, enjoined *pendente lite* the Montana company, its officers and other stockholders, from voting in favor of the transfer attempted to be accomplished by the directors. The question to be decided is involved in the statement that the directors and the holders of more than 87 per cent. of the shares of the Montana company are attempting to dispose of its entire property and business to the New York company, in exchange for the capital stock of the latter, against the objection of minority stockholders. The defendants claim that the power so to transfer exists, while plaintiffs assert that the action intended to be taken is *ultra vires* the corporation, employing that term in its strict sense as designating acts which are beyond the powers of a majority, or of any number less than all, of the stockholders, as against the minority.

At common law, neither the directors nor a majority of the stockholders have power to sell or otherwise transfer all the property of a going, prosperous corporation, able to achieve the objects of its creation, as against the dissent of a single stockholder. This doctrine is firmly established by the authority of adjudged cases, and rests upon the soundest principles. (*Abbott* v. *Am. Rubber Co.*, 33 Barb. 578; *People* v. *Ballard*, 134 N. Y. 269, 32 N. E. 54; 7 Am. and Eng. Ency. Law (2d Ed.) 734–736; Cook on Stock and Stockholders, Sec. 667, and the numerous cases there cited.) Our attention is called to certain decisions which are said to recognize a con-

trary doctrine; but examination discloses no conflict of opinion among the various courts of last resort. *Treadwell* v. *Manufacturing Co.*, 7 Gray, 393, is typical of the cases relied upon by the defendants. A short extract from the opinion (page 405) will serve to illustrate the error into which counsel has fallen: "Upon the facts found in the case before us, we see no reason to doubt that the vote of the majority of the stockholders, for the sale of the corporate property, and the closing of the business of the corporation, was justified by the condition of their affairs. Without available capital, and without the means of procuring it, the further prosecution of their business would be unprofitable, if not impracticable. Under these circumstances, it was in furtherance of the purposes of the corporation to pay their debts, close their affairs, and settle with their stockholders on terms most advantageous to them." In that case, as in every one cited by the defendants, the corporation was unable further to prosecute the purposes for which it was created.

By the common law, the acts complained of are void. If the stockholders possess the power asserted to reside in them, statutory authority must confer it. Defendants earnestly contend that such power is given by an act entitled "An act in relation to alienation of mining property by corporations," approved March 9, 1887, and carried into the Fifth Division of the Compiled Statutes of 1887, as sections 492, 493 and 494, which read as follows:

"Sec. 492. The board of trustees or officers of any mining corporation organized under the provisions of article 1, chapter 15, of the fifth division of the Revised Statutes (chapter 25 of the Compiled Statutes) of this territory shall not have power to sell, lease, mortgage or otherwise dispose of the whole or any part of the mining ground, quartz mills, smelters, concentrators or reduction works of such corporation, unless they shall have first called a meeting of the stockholders of such corporation in the manner prescribed in section 468 of said article (chapter 25) for the purpose of submitting to the stockholders of such corporation the proposition so to sell,

lease, or mortgage or otherwise dispose of the property of such corporation or some portion thereof. The notice so required to be published and sent to each stockholder shall distinctly specify each particular tract or piece of property so to be leased, sold, mortgaged or otherwise disposed of and the particular disposition to be made thereof.

"Sec. 493. If at the time and place specified in the notice provided for in the preceding section stockholders shall appear in person or by proxy, representing not less than three-fourths of all the shares of stock of the corporation, they may organize by choosing one of their number chairman of the meeting, and also a suitable person for secretary, and proceed to vote on the proposition mentioned in said notice. If there are distinct pieces or parcels of property embraced in the proposition, each separate piece of property capable of being disposed of in one parcel without material injury to the remainder shall be voted on separately. If on canvassing the votes it shall be found that at least two-thirds of all the shares of the capital stock of such corporation have been voting in favor of selling, leasing, mortgaging or otherwise disposing of a given piece or the whole of said mining property, then the chairman and secretary of such meeting shall make a certificate showing the total number of shares of the capital stock of such corporation represented in such meeting and by whom voted; the number of shares voted in favor of the proposition and the number of shares voted against the same. Such certificate shall be signed by the chairman, countersigned by the secretary and verified by their oaths, taken before some officer qualified to administer oaths. Such verification shall be to the effect that the matters and things therein contained are true, and that the meeting at which such proceedings were had was called and held in pursuance of law, to the best of their knowledge, information and belief. Such certificate shall be spread at length on the record of stockholders' meetings of such corporation, and a copy thereof under the seal of said corporation, and attested by its president and secretary, and duly acknowledged, shall be recorded in the office of the county recorder of every county wherein any of such property is situated.

"Sec. 494. If a sale shall be made as above provided of the whole of the property of such corporation, the corporation shall thereby be dissolved, and its affairs shall be wound up as provided for in other cases of the dissolution of corporations."

Defendants argue with much vigor, and some plausibility, that these sections constitute an enabling act, which grants to stockholders owning two-thirds of the shares the power to dispose of all the property of a solvent and prosperous corporation despite the protest of other stockholders. Now, by the common law, a solvent and prosperous corporation may, with the unanimous consent of its stockholders, dispose of its entire assets, but may not do so without such unanimity. Again, at the common law, a corporation which is insolvent or unable to execute the purposes for which it was created may, by its directors (or, at least, by the directors and a majority of its stockholders), sell or assign all its property when the best interests of the stockholders would be served thereby. In the proper pursuit of its business, and within the purposes for which it was created, a corporation may, by the common law, sell, lease or mortgage any part of its property, though the minority, or perhaps the majority, of the stockholders dissent.

Have the statutes quoted altered the common law in the respects mentioned? It is to be borne in mind that the common law, so far as it is applicable and of a general nature, and not in conflict with the constitution or with special enactments of the legislative assembly, is the law and rule of decision in this state, and is in full force until repealed by statute. Such is the declaration of Section 201, Div. 5, Compiled Statutes of 1887. It is to be observed, also, that a statute is not presumed to work any change in the rules of the common law beyond what is expressed in its provisions, or fairly implied in them, in order to give them full operation. For the written law to effect a repeal of those doctrines of the common law which are not unsuited to our condition, the intent of the legislature to bring about the change must be clear; and, if the intent be not fairly evident, the common law remains the rule

of decision. "Statutes are not presumed to make any alteration in the common law," say the court in *Arthur* v. *Bokenham*, 11 Mod. 150, "further or otherwise than the act does expressly declare. Therefore, in all general matters, the law presumes the act did not intend to make any alteration; for, if the parliament had that design, they would have expressed it in the act." The rules of the common law are not to be changed by doubtful implication (*Wilbur* v. *Crane*, 13 Pick. 284; *Hollman* v. *Bennett*, 44 Miss. 323); and "an intention on the part of the legislature to alter the statute law is sometimes presumed upon much slighter grounds than would support any such inference in the case of the common law" (Endlich on Interpretation of Statutes, Sec. 127). This court has often held that statutes in derogation of the common law should be strictly construed. (*Hardware Co.* v. *Sullivan*, 7 Mont. 307, 16 Pac. 588; *Palmer* v. *McMaster*, 8 Mont. 186, 19 Pac. 585.) The effect of the provision embraced in Section 3452 of the Code of Civil Procedure of 1895, with respect to the interpretation of statutes in derogation of the common law, is not of concern in this case.

By Section 450, Div. 5, Compiled Statutes of 1887, it is provided that the stock, property and concerns of an industrial corporation shall be managed by trustees; and section 482 of the same division declares that every such corporation has power, among other things, "to hold, purchase and convey such real and personal estate as the purposes of the corporation may require." Sections 450, 482, 492, 493 and 494, *supra*, should be read together as one statute. In our opinion, sections 492 to 494, inclusive, were intended for the protection of stockholders in a mining corporation. The legislative assembly seemed to be of the opinion that the interests of stockholders in such corporations were not sufficiently guarded by the principles of the common law, under which a sale, mortgage or lease, or an assignment for the benefit of creditors, could be made by the trustees or directors alone, or by them with the consent of the majority of the shares, provided the exigencies of the corporation required such disposi-

tion to be made; and for that reason, doubtless, it enacted sections 492, 493 and 494, *supra.* By section 492 the trustees are declared to be without power to sell, lease, mortgage or otherwise dispose of certain mining property of their corporation, without first calling a meeting of the stockholders; and by section 493 it is provided that, if two-thirds of the stockholders vote in favor of the proposition submitted, a certificate of that fact shall be made and recorded in the office of the recorder of the county in which the property is situate. Neither of these sections declares that the trustees or corporation may sell at all. In section 494 there is, at most, an implication only that a sale may be made if not less than two-thirds of the shares consent thereto. If a sale of the whole of the property results from proceedings conducted in conformity with the provisions of sections 492 and 493, the corporation is thereby dissolved, and its affairs must be wound up according to the provisions of section 489 by a division among the stockholders of the money and other property that shall remain after the payment of the debts and necessary expenses. Where, under sections 450 and 482, the directors would have the right, at least with the consent of a majority of the shares, to convey or otherwise dispose of the property mentioned in section 492, they may not now do so without the consent of the stockholders owning two-thirds of the shares. As we have said, at common law the directors (at least with the consent of the majority of shares) may sell the entire corporate property when the exigencies of a waning business require such action; while, to sell the entire property of a going, prosperous corporation, the consent of all the stockholders is necessary. In view of the language of the statutes quoted, there is strong reason to believe that the legislative assembly intended to prevent the alienation of the mining property specified in section 492, in any and all cases, without the consent of two-thirds of the shares. The language used in that section, being negative and prohibitory, and not permissive, also favors the conclusion that the statute was intended as a limitation upon the common law powers possessed by the directors and a majority of

the shareholders, and not as a grant of power. The statute operates, not as an enlargement, but as a restriction of corporate power. Another consideration may be suggested as lending support to this conclusion: A transfer or other disposition of all its property will not *ipso facto* dissolve a corporation, although the practical effect thereof may be to defeat the object of its organization. This is so because ownership or possession of property is not essential to corporate existence. (*Gans* v. *Switzer*, 9 Mont. 408, 24 Pac. 18; 9 Am. and Eng. Ency. Law (2d Ed.) 565.)

A flourishing mining corporation may desire to sell or otherwise dispose of its entire assets for the purpose of reinvesting the proceeds in a new enterprise within the corporate purposes, or of acquiring other mining property. Such sale or other disposition might be made at common law with the unanimous consent of the stockholders, without working a dissolution; nor would a dissolution be produced by the sale or assignment of the whole property of an insolvent corporation made by the directors, either with or without the consent thereto of all the stockholders therein. It does not seem that the legislature, when it enacted sections 492 to 494, *supra*, intended that the dissolution of a prosperous mining corporation, able to continue its existence and to accomplish the objects of its creation, should be brought about by the mere fact that it has sold all its assets. It was, however, the evident design of the legislature that a sale, made under sections 492 and 493, of the entire property of an insolvent mining corporation, or of one unable to perform the objects of its organization, should effect its dissolution, and that any transfer or disposition other than a sale would not have such an effect.

There seems to be reason for affording greater protection to stockholders in mining than to those in other industrial corporations. Mining, of all legitimate enterprises, is probably the most uncertain, and, indeed, precarious. Mines and mining claims are more subject to sudden and unexpected fluctuations in value (or seeming value) than is any other character of real property; and this is true in a peculiar degree as to those of

gold and silver, which in 1887, when the act was passed, before the copper output of Montana was as considerable as it has since become, constituted the chief mining interest in the state. The temptation to sell or dispose of such property unadvisedly or fraudulently, and the facilities to that end recognized by the common law, induced the legislature to prohibit any transfer not consented to by two-thirds of the shares.

In reaching the conclusion announced, we have not overlooked Sections 467, 468, 469, 488 and 489, Fifth Div. Comp. Statutes of 1887, providing that an industrial corporation may increase or diminish its capital stock, extend or change its business to any other branch of corporate pursuits, extend the term of its life, or dissolve and disincorporate itself by appropriate proceedings, whenever two-thirds of the stockholders at a meeting called for that purpose decide by vote so to do; although counsel do not seem to rely upon them. We are satisfied that none of them has application to the facts presented in the case at bar. The meeting of June 6, 1898, was not called for the accomplishment of a purpose within the purview of the sections to which reference has just been made.

There is another reason why the attempted disposition of the property is *ultra vires* the corporation. Even if it be conceded that the act of March 9, 1897, is an enabling act, clothing the directors and the stockholders owning two-thirds of the shares with power not possessed at common law, yet the disposition intended to be made is not one authorized by the act. Manifestly, the transfer proposed lacks an element necessary to constitute a sale, namely, a pecuniary consideration. To constitute a sale, there must, as a general rule, be a consideration in money. The proposed transaction is, at best, merely an exchange; and the defendants claim that the expression "or otherwise dispose of," used in section 492, operates to confer upon the corporation the power to exchange as well as to sell the entire property of the corporation without the consent of every stockholder therein. We do not think the general enumeration of the powers by the terms "sell, lease, mortgage, or otherwise dispose of" operates

either to confer upon mining corporations the power to exchange, or as a recognition of it as already possessed by other industrial corporations. The words "or otherwise dispose of" are not sufficiently vigorous to justify the construction urged by defendants; and, in so far as they may seem sufficiently significant to require their application to powers other than those specifically named, they may be satisfied by reference to the right to assign for the benefit of creditors, to hypothecate or pledge, or possibly even the right to remove or destroy, the mills, smelters, concentrators, or reduction works, rather than by allowing them, by mere implication, to create or recognize a power radically different from those particularly specified. It must be admitted that the sale of the assets and the distribution of the proceeds is vitally different from the enforced exchange of those assets for the capital stock of a foreign corporation; and, in recognition of this difference, counsel claim that the statute confers the power to exchange, in addition to the power to sell. In exercising the power of sale which defendants claim is conferred by the statute, it would be necessary for those in control of the corporation to act with a due regard for the interests of all stockholders, and to pursue such a course as would insure the accomplishment of the best result attainable; and if those holding the requisite majority of the stock should not only determine that the entire assets of the company should be sold, but should adopt and direct such method of procedure as would prevent competition, or in any other way involve a sacrifice of the corporate assets or endanger the interests of any of the stockholders, such proceeding could be checked and controlled by the courts, as both the management and the winding up of the corporation may properly be regarded as the performance of a trust with which the property is charged for the benefit of all who are entitled to share in the division of the profits or in the distribution of assets.

Assuming, then, that the holders of two-thirds of the stock of the corporation may legally decide many vital questions concerning the affairs of the corporation, and lawfully execute

the plans thus adopted, notwithstanding the opposition of the minority, and that they may sell all the assets of a solvent, prosperous corporation, and thereby dissolve it, yet it must always be remembered that co-extensive with these large powers are correspondingly important duties, which devolve upon those who are intrusted with the right to determine the direction of the corporate affairs. Hence, under such circumstances, the minority, though powerless to prevent the sale, may insist that the method of procedure shall be such as would be fair and proper in the discharge of any other trust under which they were beneficiaries. By recognizing this relation of trustee and beneficiary as existing, at least by analogy, between the stockholders in control or the directors selected by them and the minority stockholders, the further distinction between a sale and a mere exchange of corporate assets is fully appreciated.

It has been suggested that a power of sale must include the power to exchange, because the greater includes the less; but no such comparison can properly be made, as neither includes the other, and neither is part of the other. In the event of a sale, properly and fairly conducted, whether by public auction, by sealed bids, or by any other method calculated to produce the best result attainable, each of the stockholders has an equal right to become the purchaser of the whole or any part of the corporate assets, each is equally interested in obtaining the highest price for the common property, and each is entitled to an equal *pro rata* share of the proceeds; but if the holders of any number of shares, however large, be authorized to exchange the corporate assets for the capital stock of a foreign corporation, the law furnishes no measure by which to determine the prudence or wisdom of the exchange, or to test the fidelity of those clothed with the power and charged with the duty incident to such proceedings. If defendants' contention be correct that Sections 492 and 493 contain a grant of power, these *quasi* trustees may, when authorized by two-thirds of the shares, determine to convert the assets into cash, and distribute the proceeds among those

beneficially interested; but they cannot change the nature of the trust estate except in the manner provided by law, and they can then do so only for the purpose of continuing operations in this state, and not for the purpose of transferring the *corpus* of the estate or its ownership to a foreign jurisdiction. (*Taylor* v. *Earle*, 8 Hun. 1.) It is true that, under our laws, the holders of the requisite majority of shares in a mining corporation may determine to abandon the mining industry, and, for example, embark in a manufacturing enterprise, by amending their charter, and may sell the mining assets, and reinvest in proper purchases for the new corporate object; but these steps, however important, are part of the internal management of a domestic corporation, and must be conducted in accordance with our law. The power to exchange the corporate property for the capital stock of a foreign corporation is not incident to these proceedings.

But there seems to be neither a sale or an exchange nor other disposition of the mining property, within the meaning of the statute. "To otherwise dispose of" does not signify and include "to give away," within the meaning of the statute. The New York corporation is formed. It has no property. It possesses nothing but a name. Attempt is made in the name of the Montana company to convey its property to the New York company, for which the Montana company receives nothing in return. It does not exchange its property for other property. There is, in effect, simply a change of corporate habitation. So far as stockholders are concerned, they are, perhaps, permitted to exchange their shares in the Montana company for the same kind of property in another state, and the laws of Montana for the laws of New York. The statute does not provide that, by a two-thirds vote, stockholders shall exchange their shares for shares in another corporation, or in the same corporation with changed citizenship. It has no reference to such a scheme. A stockholder, we think, may not be compelled to take, in lieu of his stock in the Montana corporation, an equal number of shares in the New York corporation, or the value of those

shares; nor can he be compelled to accept payment for his shares in any other way than that prescribed by the Montana statute on a dissolution of the Montana corporation. The Montana company conveys all its property, and gets nothing in return. If the trustees attempt to wind up its affairs, under section 489, *supra*, there would be nothing to distribute. The new company promises to issue certain of its shares to each Montana stockholder, but we are unable to see how he can be deprived of his interest in the Montana company without his consent. Our statutes do not seem to confer upon two-thirds of the stockholders of a solvent and prosperous corporation the right to take the citizenship of the corporation to another state, without the consent of all the stockholders. The transfer of the seat of corporate authority, and domicile and citizenship, of a corporation, from one jurisdiction and state, under whose constitution and laws the corporation has been organized and conducted, to another jurisdiction and state, with a different constitution and code of laws, certainly should not be undertaken without clear and ample authority; and no authority is found in our statutes permitting this to be done. *Taylor* v. *Earle*, *supra*, is directly in point.

Holding, as we do, that the proposed transfer is *ultra vires* the corporation, and therefore void, consideration of the question whether the transaction would, if accomplished, result in a consolidation or merger of the Montana company with the New York company, is unnecessary. The order appealed from is affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

ON RE-HEARING.

21 565
*23 126

[December 21, 1898.]

The bona fide purchaser of stock may enjoin the ratification of an illegal transfer of corporate property which was *ultra vires* and made before his purchase, the former owners of the stock never having acquiesced in the transfer.

On an appeal from an order granting an interlocutory injunction, the trial court will be presumed to have found all controverted facts necessary to support the order in favor of the prevailing party.

An order granting an interlocutory injunction will not be vacated on the ground that one of the plaintiffs is prohibited from bringing the action.

Section 405, Code of Civil Procedure, which provides that an attorney must not, directly or indirectly, buy a bond, note, bill of exchange, or other thing in action, with the intent and for the purpose of bringing an action thereon, does not include shares of the capital stock of a corporation.

The Supreme Court will not, ordinarily, on application for a re-hearing, consider grounds for reversal not presented on the hearing.

PER CURIAM. Appellants have moved for a re-hearing on several grounds, which we shall very briefly consider.

1. It is insisted that respondents have no standing in equity, for the reason that the shares standing in their names were not held by them at the time the acts complained of were committed, and have not devolved upon them since by operation of law. This contention was fully presented on the hearing, is discussed in subdivision 2 of the opinion, and held untenable, because respondents were the owners of the shares when they sought to obtain the injunction restraining appellant from voting the stock controlled by them in favor of ratifying the transfer theretofore attempted to be made, and from authorizing a transfer in the name of the Montana company to the New York company. Counsel seem to labor under the impression that the court has overlooked the fact that respondents were not owners at the time the directors made the transfer, and urge that this alone is sufficient to defeat them. We cannot agree with counsel. The statement of facts preceding the opinion discloses that the shares were never voted in favor of the transfer, and that the former owners in no wise assented thereto; hence the stock reached respondents free from any such burden or taint in respect to the proceedings taken by the directors as perhaps might have

followed upon consent or acquiescence in the transfer by the former owners. Appellants fail to recognize the distinction between the right of the holder of shares to complain of an *ultra vires* act committed before he acquired them, which the former owner neither participated in nor assented to, and the attitude of one acquiring shares with knowledge that the former owner had voted them in favor of the act afterwards sought to be annulled by the later holder. In the one case the present holder is not estopped or debarred from maintaining suit, unless by force of some statute or rule of court, while in the other case it would seem that the assignee of the shares would succeed to, and be affected with, the disability of the prior owner to object to the act which theretofore had been approved by him. (See Morawetz on Private Corporations, Sections 264–268.)

Counsel assert that so much of equity rule 94, promulgated by the Supreme Court of the United States, and quoted in the opinion, as requires the complaint to contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share has devolved upon him since by operation of law, is but declaratory of the equity practice. No such principle, however, has ever prevailed in courts of equity. On the contrary, the transferee in good faith, who has acquired his shares after an *ultra vires* act has taken place, obtains, to say the least, the rights possessed by the prior holder, and the transferee's right of action is derived by purchase of the shares from the former owner; and if the former owner has neither voted the shares in favor of, nor acquiesced in, the unauthorized act, the transferee is not disqualified from maintaining a suit to annul such act, upon the ground that he was not a shareholder at the time of the transaction of which he complains. The doctrine is so well established, and rests upon such solid foundations, that citation of authorities seems useless. We venture, however, a quotation from the opinion in *Winsor* v. *Bailey*, 55 N. H. 218, one case out of the multitude which recognize the doctrine: "It is contended for the defendants that the bill is

defective, in not showing that they were owners of stock at the time of the alleged wrongful payment to some or all of the defendants. No authority is referred to in support of this position, and I see no sound reason upon which it can be sustained. To hold so would seem to involve the singular consequence that the transfer of stock in a corporation extinguishes the right to inquire into the previous fraudulent conduct of its officers, whereby its funds have been misappropriated. * * * The plaintiffs allege that they are stockholders in the Hooksett Manufacturing company, and specify the number of shares owned by each, but do not allege that that they were stockholders at the time the dividend was paid the defendants. But that is not necessary, and it is immaterial whether they were or not. The transfer of the stock conveyed to them, not only the ownership of the shares, and the right to the future dividends thereon, but also placed them on an equal footing with the other stockholders in respect to the right to call the officers and agents of the corporation to an account for their fraudulent conduct."

Appellants rely upon the remarks of the court in *Alexander* v. *Searcy*, 81 Ga., at page 550, S. E. 630, to the effect that, by the weight of authority, a person who did not own stock at the time of the transactions complained of cannot maintain suit to have them declared illegal, to which are cited some federal decisions. The view of the Georgia court is founded upon an erroneous assumption that the rule peculiar to the federal courts is declaratory of equity practice, or is to be observed in state courts. That portion of equity rule 94 which appellants say ought to govern here, and which, so far as the United States courts are concerned, obliterates the well-founded distinction indicated, was adopted by the federal supreme court, after the decision in *Hawes* v. *Oakland*, 104 U. S. 450, as a measure tending to prevent the bringing of suits in federal courts which the jurisdiction of those courts is not intended to embrace, and which are properly cognizable in the state courts. But neither the rule nor the peculiar reason upon which it rests should be followed by state courts

in administering the general principles of equity. The following quotation from section 269 of the treatise of Mr. Morawetz on Private Corporations is pertinent: "The supreme court has authority, under the judiciary act, to establish rules of practice, but not to alter the substantive law. Equity rule 94 is mainly declaratory of the existing law. The only material change which it makes is to require the plaintiff to show that he was a shareholder at the time of the transaction of which he complains, or that his share has devolved upon him since by operation of law. This requirement was evidently designed as a rule of practice merely, and was deemed by the supreme court to be necessary in order to guard the courts from being imposed upon by collusion of the parties." To the same effect, see Cook on Stock and Stockholders, Sec. 737; Wait on Insolvent Corporations, Sec. 628; Spelling on Private Corporations, Sec. 467. Were equity rule 94 applied in all courts, the holders of shares purchased after the doing of an act *ultra vires* would be remediless; for no tribunal could take cognizance of, or undo, the wrong perpetrated.

2. It is next claimed that "the evidence conclusively, and without contradiction, establishes that Forrester and MacGinnis bought this stock for the purpose of bringing this action" in the interest of a rival corporation, and that the court below did not make a finding to the contrary. As to the point that the evidence does not justify the conclusion which was reached by the court below, we quote from subdivision 3 of the opinion: "The court below found that plaintiffs owned the shares, and that they were acting in good faith, and we cannot say that the evidence received on the hearing so clearly proves the contrary as to warrant us in deciding that the lower court erred in determining the question as it did. On the hearing of the application for the injunction *pendente lite*, the matter was one peculiarly within the discretion of the court below." This we reaffirm. We have again examined the testimony preserved in the record, and now add that the inferences deducible therefrom would

have justified the court below in determining either that plaintiffs, in acquiring the shares and bringing the suit, were prompted by improper motives, or that they did so in good faith. Whether or not there was a formal finding sufficient to withstand technical objections of the most refined subtlety, we do not pause to discuss; nor is it necessary to decide whether express findings of fact are recognized in practice as properly the basis of an intermediate order, since the presence or absence of such a finding in the present case is not material. Where the evidence is in substantial conflict, or (which is the same thing) where the evidence is reasonably susceptible of different inferences, the trial court must (at least, in the absence of express findings) be presumed to have impliedly found every fact necessary to support its interlocutory injunction order, or, rather, in a case on appeal from such order, is presumed to have determined the question upon which the conflict exists in favor of the prevailing party. We again refrain from intimating any opinion as to whether a purchase of stock with the intention of suing in the interest of a rival corporation, and not for the benefit of nonassenting shareholders only, would entitle plaintiff to relief. The facts disclosed do not demand the expression of an opinion upon that question.

3. Our attention is called to the opinion in *Campbell v. Argenta Gold and Silver Mining Co.*, 51 Fed. 1, in which it was held that the act of the president and secretary in making a mortgage of the entire property of a mining corporation in pursuance of the unanimous vote of stockholders at a meeting not called or held in conformity with Section 468 of the Fifth Division of the Compiled Statutes of 1887 is not *ultra vires*, but as against all the world, except the corporation and its stockholders (who were, under the facts, estopped), is valid; and, in commenting on this opinion, counsel say: "As we understand it, the act *ultra vires* is one that under no circumstances could a corporation perform, and that, if the act is such as is within the power of the corporation to perform under the circumstances, it is not *ultra vires*, but *intra vires*."

There should be no question as to the sense in which this court employed the term, for we declared in paragraph 6 of the opinion: "The defendants claim that the power so to transfer exists, while plaintiffs assert that the action intended to be taken is *ultra vires* the corporation; employing that term in its strict sense, as designating acts which are beyond the powers of a majority, or of any number less than all, of the stockholders, as against the minority."

4. It is again urged that the New York company is not only a purchaser for value, but, in issuing its stock for the property, became a purchaser in good faith—as much so as if money had been paid for the property—and that, therefore, the court, in deciding that the transfer was not a sale, is in error as to the law. The opinion carefully considers this argument, and we are satisfied with the course of reasoning and the conclusion reached.

5. Appellants renew their contention that Sections 492, 493 and 494 of the Fifth Division of the Compiled Statutes of 1887 constitute an enabling act, which grants to stockholders owning two-thirds of the shares power to effect, through directors or officers, a disposal of all the property of a solvent and prosperous corporation, notwithstanding the dissent of other stockholders. No new reasons have been advanced in support of appellants' position, and, upon further consideration, we are entirely satisfied with the determination heretofore made.

6. Section 405 of the Code of Civil Procedure provides: "An attorney and counselor must not, directly or indirectly, buy or be in any manner interested in buying, a bond, promissory note, bill of exchange, book debt, or other thing in action, with the intent and for the purpose of bringing an action thereon." In their brief upon this application, appellants invoke the provisions of this section. It appears that plaintiff Forrester, who resides and practices his profession without the state of Montana, is one of the attorneys of the Montana Ore Purchasing Company. Counsel say they "do not contend that section 405, literally construed, applies exactly to Mr. For-

rester's position," but suggest that a broad view of the statutes would include it. We might dispose of this contention by referring to what has been said in the original opinion, and here, in respect of the conflict of the evidence as to the purpose of plaintiffs in purchasing the stock and bringing the suit, but we prefer to state some of the reasons why section 405 is inapplicable. In the first place, plaintiff MacGinnis is free from the supposed disability alleged against Forrester. Again, the action was not brought upon a thing in action. Our statute seems to have been borrowed from New York, which has a section identical in effect with section 405; and in *Ramsey* v. *Gould*, 57 Barb. at page 408, the court, in construing the section, said: "The chose in action intended by the statute is one on which a suit can be brought. This action is not brought upon the stock. That is not the cause (subject?) of action; and although, in some respects, it may resemble a chose in action, it is not strictly such. The statute is a penal one, and cannot be extended to what is not expressly included in it. It is plain, I think, that the purchase of stock was not a violation of the statute, and that the complaint cannot be dismissed upon this ground." And of this we approve. Moreover, the point that section 405 is applicable to Forrester was not made on the argument upon which the case was submitted; and the general and well-founded rule is that the supreme court will not, ordinarily, on application for a rehearing, consider grounds which were not presented on the hearing. (*Merchants' National Bank* v. *Greenhood*, 16 Mont. 460, 41 Pac. 250, 851.) While there seems to be no reason why the rule should be departed from in this case, or why this motion should be excepted from its operation, yet the statute relied on is so manifestly without application that we feel no hesitation in so declaring.

7. Another reason urged in support of the motion for a rehearing is that "the decision conflicts with the whole weight of authority of the best considered American cases." The result of attentive examination which we have given to the citations furnished us by appellants fails to sustain their assertion.

The foregoing disposes of every point made by appellants which is worthy of comment. After full discussion, participated in by all the justices, we are, upon mature reflection and deliberation, satisfied that the better reasons, as well as the established principles of law, sustain the decision heretofore rendered; and such is the unanimous opinion of this court. The motion for a rehearing is denied.

Motion denied.

H. L. HAUPT, ET AL., APPELLANTS, v. WILLIAM BURTON, ET AL., RESPONDENTS.

[Submitted Oct. 31, 1898. Decided Nov. 29, 1898.]

Judgments—Assignment—Revival—Limitations—Jurisdiction—Parties.

1. Under Code of Civil Procedure (Compiled Statutes of 1887) Section 1, providing that there shall be but one form of civil action for the enforcement of private rights, a judgment may be revived by a civil action; and this, though section 349 also authorizes an execution to issue after five years from the judgment, by leave of court.
2. A judgment for possession of land may be revived the same as a judgment in a personal action, and the judgment as revived should be that plaintiff have execution, and be given possession as against defendants and their successors.
3. Compiled Statutes of 1887, Div. 1, Section 41, providing that an action on a judgment of any court of the United States or any state therein shall be commenced within six years, applies to judgments rendered by the courts of Montana.
4. Under Code of Civil Procedure (Compiled Statutes of 1887), Section 66, providing that civil actions are commenced by filing a complaint, a complaint to revive a judgment filed within six years confers jurisdiction, though the summons is not served within that time, notwithstanding, by section 80, the court is deemed to have jurisdiction in a civil action from the service of summons.
5. The assignee of a judgment may sue to revive it, under the law requiring suits to be brought in the name of the real party in interest.

Appeal from District Court, Silver Bow County.

ACTION by H. L. Haupt and others against William Burton and others to revive a judgment. There was a judgment for defendants, and plaintiffs appeal. Reversed.

Wm. Scallon and *F. T. McBride*, for Appellants.

Ella Knowles Haskell and *E. B. Howell*, for Respondents.

HUNT, J.—On March 20, 1886, Michael Hickey, George W. Stapleton and J. C. Robinson obtained a judgment in the district court of Silver Bow county against the respondents, for the possession of a certain piece of ground. Execution was not issued until March 19, 1892. The sheriff did not oust the defendants under the execution, and they remained in possession. On the same day, March 19, 1892, H. L. Haupt and George H. Casey, having succeeded to the interests of Hickey and Stapleton in said judgment, commenced this action to revive the said judgment. On September 8, 1896, they thereafter filed their amended complaint. The original complaint set up the judgment and the fact that it had not been satisfied, and that defendants still remained in possession. The prayer was for judgment for the possession of the ground. The amended complaint more elaborately set up the judgment, and the issuance and return of the execution, and prayed that the judgment might be revived, and that execution issue thereon. Defendant Burton answered separately, denying the title in Haupt and Casey to the interest of Hickey and Stapleton in the judgment, and pleading the statute of limitations. The replication denied the material averments of the answer. The other defendants likewise answered, pleading the statute of limitations and other matter. This was replied to by a denial of the affirmative allegations of the answer.

Upon the trial of the case, the defendants objected to testimony being introduced by plaintiffs, for lack of jurisdiction in the court, because the complaint did not state facts sufficient to constitute a cause of action, and because it appeared on the face of the complaint and pleadings that the cause of action was barred. The court sustained the defendants' objections, and ordered judgment against plaintiffs and in favor of defendants. The plaintiffs appeal.

We regard this proceeding as an action to revive a judgment. We say "an action" to revive, because, under the Compiled Statutes of 1887, which obtain herein, there was a remedy by action; and even under the common law, although *scire facias* was a judicial writ, yet, because the defendant

might thereupon plead, *scire facias* was accounted in law to be "in the nature of an action." Coke's Institutes, *page 524. By Section 410, page 171, Compiled Statutes of 1887, the writ of *scire facias* was abolished in the following provision: "The writ of *scire facias*, the writ of *quo warranto*, and proceedings by information in the nature of *quo warranto*, are abolished. The remedies obtainable in these forms may hereafter be obtained by civil actions under the provisions of this chapter." The language "this chapter" may confine the abolition of the writ itself to those instances where it could have issued in public matters brought within the scope of the particular chapter of which section 410 is but a part. However, there being no provision, in the chapter referred to, specially pertinent to *scire facias* to revive a judgment, possibly the legislature did not intend, in the language used, to abolish the writ, except where it could have been used as affecting public remedies; but, if this is so, the effect would be to leave the right to revive a judgment by writ of *scire facias* wholly unaffected by section 410; so we must look at other provisions of the Compiled Statutes. We note in passing that that clause of our statute just quoted (section 410) is identical with section 424 of the South Carolina Code of Civil Procedure. The "chapter" referred to in the South Carolina Code (chapter 2, Rev. St. S. C. 1893), like the "chapter" of the Compiled Statutes of Montana, had to do particularly with actions for the usurpation of office and other public cases. In *Lawton* v. *Perry*, 40 S. C. 255, 18 S. E. 861, doubt was expressed as to the true signification of the words "this chapter," the court hesitating to apply them to the whole Code of Civil Procedure, although it was decided upon other grounds that the writ of *scire facias* was altogether abolished in that state. It is not material here, though, whether said section 410 does affect the ancient writ, inasmuch as its form was abolished by the adoption of other sections of the Montana Code, though, we think, the remedies obtainable by the writ may still be enforced by civil action. (*U. S.* v. *Ensign*, 2 Mont. 396; *Lawton* v. *Perry*, *supra.*)

Section 1, Code of Civil Procedure (Compiled Statutes of

1887), provides "that there shall be in this territory [state] but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs, which shall be the same at law and in equity." Civil actions in the courts are commenced by filing a complaint. (Section 66 *Id.*) It is doubtless true, the revival of the judgment described in plaintiff's complaint might have been effectually accomplished by motion for leave to issue execution, under Section 349 of the Code of Civil Procedure, which authorizes an execution to issue after a lapse of five years from the entry of judgment after obtaining leave of the court upon motion with notice to the adverse party. This procedure was considered in *Peters* v. *Vawter*, 10 Mont. 201, 25 Pac. 438. But the mode of enforcing a judgment by issuing execution under section 349, *supra*, is a cumulative remedy, in no way affecting the right to revive the judgment by suit for that purpose. (*Rowe* v. *Blake*, 99 Cal. 167, 33 Pac. 864.) The right of revivor by suit is recognized in *United States* v. *Ensign*, cited, while the right of revivor by motion is sustained in *Peters* v. *Vawter*, *supra*. In the leading case of *Carter et al.* v. *Coleman et al.*, 12 Iredell (N. C.) 274, it was decided that, where there was a dormant judgment, plaintiff might have a *scire facias* to revive, and an action to recover the amount of the judgment, both pending at the same time; and that a judgment on the *scire facias* could not be pleaded in bar of the action of debt. And in *McDonald* v. *Dickson*, 85 N. C. 248, upon a case where motion for leave to issue execution had been granted, it was held execution might be had on a judgment, and at the same time action on it could be prosecuted by leave of court. (Freeman on Judgments, Sec. 440; *Garibaldi* v. *Carroll*, 33 Ark. 568; Am. and Eng. Ency. Pl. and Prac. p. 1088.)

Either proceeding—that by motion, or that by filing of a complaint where revivor is the remedy sought—has for its object a means to secure to the judgment creditor the fruition of his judgment. In either case the court's power and jurisdiction are complete. Neither is an independent new action; and

although where, as in the case before us, a complaint is filed setting up the original judgment obtained, the form is necessarily by a separate action, still, no matter what the form may be and what the practice, after all it is but the continuation of the old action, and but a means to revive an antecedent judgment, that might otherwise have become valueless or inoperative so far as the right to issue execution goes. The defenses to the action are limited. The jurisdiction may be assailed, or the existence of the record attacked, or payment or accord or discharge and satisfaction may be set up; but in no case can matters be determined which were settled in the original suit. (*Smith* v. *Stevens*, 133 Ill. 183, 24 N. E. 511; Freeman on Judgments, Sec. 443.)

The life of a judgment under Section 41 of the Code of Civil Procedure (Compiled Statutes of 1887) was six years. It was accordingly necessary for plaintiffs to bring their suit within that time after date of the judgment sought to be revived. This they did, and, by so doing, have acquired a standing in court. The original complaint was not wholly defective. It set up the judgment, and while, perhaps, it was defectively stated, there was a cause of action pleaded. The amended complaint is perfectly good.

The fact that plaintiffs seek to revive a judgment in a real action cannot affect the principle of the right of revivor. Why should not the same rule prevail in real as does in personal actions? The original judgment was for possession of land, and the judgment here should be that plaintiffs have execution, and be given possession, as against defendants and their successors. (Freeman on Judgments, Sec. 443; 21 Am. and Eng. Ency. Law, p. 855; *Kennebec Purchase* v. *Davis*, 1 Me. 309.)

It is argued that Section 41, First Div. Compiled Statutes of 1887, which provides that an action upon a judgment of "any court of the United States, or of any state or territory within the United States, shall be commenced within six years," is inapplicable to judgments rendered by the courts of this state; and we are cited to *Pitzer* v. *Russell*, 4 Or. 129, and *Burns* v. *Conner*, 1 Wash. 6, 23 Pac. 836, which hold

that way. The great weight of authority is against those decisions, and we believe that, in the absence of any exception from the statute of actions upon judgments of the courts of this state, they are within the letter of the code. It has been so decided by the following cases: *Hummer* v. *Lamphear* (Kan. Sup.) 4 Pac. 865, approved in *Schuyler Co. Bank* v. *Bradbury* (Kan.) 43 Pac. 254; *McDonald* v. *Dickson* (N. C.), *supra*; *Mason* v. *Cronise*, 20 Cal. 217; *Rowe* v. *Blake*, *supra*.

It is said that the jurisdiction of the court expired on the 20th day of March, 1892. This argument proceeds upon the ground that, a lien of a judgment being for six years under Section 307, p. 139, Compiled Statutes of 1887, execution cannot issue after six years, and upon the further ground that by section 80, p. 79, *Id.*, from the time of the service of a summons in a civil action the court is deemed to have jurisdiction; whereas here the summons was not served until May 21st, two months after six years had expired. This argument is refuted by repeating that, when plaintiffs filed their complaint within the six years after the date of judgment, they commenced their action under Section 66 of the Code of Civil Procedure, and the omission to serve the summons within the aforementioned six years does not deprive the court of jurisdiction, or the plaintiffs of their right to sue upon the judgment within the time prescribed. (*Trenouth* v. *Farrington*, 54 Cal. 273; *Crim* v. *Kensing* (Cal.) 26 Pac. 1074.)

In statutory proceedings to have execution issued upon motion, under section 349, heretofore cited, different rules may obtain, but we need not consider them here, as plaintiffs have proceeded by the form of another action.

Nor is there any attempt by this action to modify the judgment or the record upon which it is based. The original judgment was obtained by Michael Hickey, G. W. Stapleton and J. C. Robinson. Revivor is sought in the name of H. L. Haupt and George H. Casey, the purchaser of the interest of J. C. Robinson, deceased. It also appears by the complaint of record that Haupt and Casey succeeded to the interests of Hickey and Stapleton through conveyances in due form. As

the real parties in interest, therefore, we hold plaintiffs herein had a right to institute this action. Where the judgment has passed by assignment to a third person, the determination of the proper parties plaintiff in a suit to revive depends upon the statutes of the particular jurisdiction. (Black on Judgments, Sec. 488.) In Montana, the law requiring all suits to be brought in the name of the real party in interest, a remedy by proceedings in *scire facias* should be sued out in the name of the assignees. (See *McGregor* v. *Wells, Fargo & Co.*, 1 Mont. 142.)

Nothing in *Boyd* v. *Platner*, 5 Mont. 226, 2 Pac. 346, conflicts with this opinion, for that case only decided that parties not shown to be interested in the judgment sought to be revived cannot obtain the benefits of revivor. The showing here is that plaintiffs in this action have an interest entitling them to the relief sought. It follows that the district court erred in sustaining defendants' motion for a nonsuit, and awarding judgment to defendants. Judgment reversed, and cause remanded for further proceedings. Remittitur forthwith.

Reversed and remanded.

PIGOTT, J., concurs. PEMBERTON, C. J., disqualified.

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21 578 29 279 STATE OF MONTANA, RESPONDENT, *v.* CICERO L. BRISTOL, APPELLANT.

[Submitted Nov. 22, 1898. Decided Nov. 30, 1898.]

Courts—Terms—Establishment.

Constitution, Article 8, Section 17, provides that, unless otherwise provided by law, district judges shall fix the terms of court in districts composed of two or more counties; and Code of Civil Procedure, Section 38, requires the district judge in districts composed of more than one county, within a stated time, to fix the terms of court to be held in each county of the district during the ensuing year, and provides that no change in the time of holding any of the terms so fixed shall be made, but that a term may be adjourned to a future date. *Held*, that an order fixing the terms of court in

a district composed of more than one county, made within the prescribed time, cannot, even within the time allowed the judge for fixing the terms of court, be revoked and the terms originally fixed changed.

Appeal from District Court, Teton County; D. F. Smith, Judge.

J. E. Erickson and *Henry N. Blake*, for Appellant.

C. B. Nolan, for the State.

PER CURIAM.—The defendant, Cicero N. Bristol, convicted of embezzlement, appeals from an order of the district court of Teton county denying a new trial, and from the judgment of his conviction.

It appears that on January 2, 1897, the Honorable C. W. Pomeroy, judge of the Eleventh judicial district court, comprising the counties of Teton and Flathead, duly made and caused to be filed an order fixing March 8th, May 24th, August 16th and November 8th as the days on which the terms of court should commence in Teton county, for the year 1897. It further appears that on January 4th the Honorable D. F. Smith, who had meanwhile become judge of said district, made and caused to be filed an order purporting to revoke the one of January 2d, and fixing the commencement of said terms on January 25th, April 26th, July 26th and October 11th.

Pursuant to the last mentioned order, the July term of the district court of Teton county began on the 26th of that month; and, under an order of the court dated July 26th, a jury was drawn and summoned to serve during the term. The July term was adjourned to October, 1897, when the defendant was tried by the jury so drawn and summoned. He interposed a challenge to the panel, upon the ground that there had been a material departure from the law in the drawing and return of the jury, in that the time designated for the attendance of the jury was not any term of court fixed by the order of January 2d. The challenge was disallowed, defendant excepting.

Was there a material departure from the requirements of law in respect of the drawing and return of the jury? Section

17 of article 8 of the constitution contains a provision to the effect that the judge of each district where two or more counties are united shall, until otherwise provided by law, fix the term of court. Section 38 of the Code of Civil Procedure reads as follows: "The district court of each county which is a judicial district by itself has no terms, but must be always open for the transaction of business, except on legal holidays and non-judicial days, and must hold its sessions at the county seat. Juries for the trial of causes must be called on the first Monday of every alternate month, if the judge so direct, and oftener, if public business requires. In each district where two or more counties are united, the judge thereof must fix the terms of court in each county in his district, which must be held at the county seat, and there must be at least four terms a year in each county. The judge of such district court must, within ten days after the taking effect of this code, and thereafter, within ten days after the first day of January in each year, make an order which must designate the times at which the terms of court are to be held in each county in his district during the year, and must cause said order, or a copy thereof, to be filed in the office of the clerk of the district court in each county in his district, and such clerk must cause the same to be published in some newspaper printed in his county, once a week for four successive weeks, immediately after the filing of such order, the cost of which shall be a county charge, and no change in the time of holding the terms so fixed in any county must be made during the year. A district judge may adjourn a term of court in one county to a future day certain, and in the meantime hold court in another county."

We are of the opinion that the question must be answered in the affirmative. By section 38 the judge is commanded to make, within ten days after January 1st, in each year, an order which must fix the times at which the terms are to be held in the district during the year, and no change in the time of holding the terms so fixed must be made during the year. By the order of January 2d, the times for holding the terms were

fixed for the year 1897, and the order was made on a day included within the period prescribed. The order of January 4th, revoking the former order, and fixing other dates for the terms to be held in 1897, was in palpable disregard of the prohibition declared, and was, at least, irregular.

Defendant was entitled to trial by a jury in attendance at a term of court regularly designated and held in conformity with the direction and intent of the legislature, as expressed in section 38. The jury summoned to be in attendance at a term other than the one designated in the order made by Judge Pomeroy was not regularly drawn and returned; and in this there was a material departure from the law. Timely objection by challenge to the panel, founded upon that ground, was interposed by the defendant, and he preserved his rights by exception to its disallowance. For this error there must be a reversal.

There is but one other assignment relied upon in this court. The defendant argues that the instruction upon the subject of "reasonable doubt" is radically defective, and omits a material element found in the definition of that expression as given in *Territory* v. *McAndrews*, 3 Mont. 162. We express the hope that trial courts will give the instruction on the subject of reasonable doubt which is approved in the McAndrews case; and we again express regret that the occasion seems to demand the warning that danger lurks in the attempt to improve upon its language. (*State* v. *Clancy*, 20 Mont. 503, 52 Pac. 267; *People* v. *Chun Heong*, 86 Cal. 332, 24 Pac. 1021.) It is not likely, however, that upon a new trial the court will disregard the suggestion here made, and we therefore refrain from inquiring whether the last error assigned is well taken. The judgment and order refusing a new trial are reversed, and the cause is remanded. Remittitur forthwith.

Reversed and remanded.

21	582
29	22
122	304
21	582
23	373
21	582
25	406
21	582
27	336
21	582
29	518
21	582
32	99
21	582
34	28
e34	423
21	582
35	7
21	582
41	599

STATE OF MONTANA, RESPONDENT, *v.* MIKE ROLLA, APPELLANT.

[Submitted Nov. 14, 1898. Decided Dec. 5, 1898.]

Homicide—Instructions—Self-Defense—Calling Eyewitnesses.

1. An instruction that it was the duty of accused to "exhaust all other reasonable means within his power consistent with his safety to prevent the homicide" before taking the life of deceased is erroneous, where there is evidence tending to show that the accused was murderously attacked by the deceased and his brother, near defendant's home.
2. An instruction that "the right to take life is limited to the apparent actual and present necessities then suddenly precipitated by the assailant, under such circumstances as then appear to the slayer, as a reasonable man, to place the life or person of the slayer in such peril as to admit of no other reasonable alternative than the killing of the assailant," is erroneous, in that it ignores the right of accused to act on what appeared to him at the time, as a reasonable man, necessary to save his own life, or prevent his receiving great bodily harm, although he was in no actual danger.
3. Where conflicting propositions of law are given to the jury on a material point, one correct, and the other incorrect, the error is fatal.
4. Penal Code, Section 2082, providing that "upon a trial for murder or manslaughter it is not necessary for the state to call as witnesses all persons who were shown to have been present at the homicide, but the court may require all of such witnesses to be sworn and examined," does not make it imperative that all such witnesses should always be introduced by the state, but authorizes the court to require it in its discretion.
5. Under Penal Code, Section 2082, authorizing the court to require all persons who are shown to have been present at a homicide to be called as witnesses by the state, a refusal to order such witnesses placed on the stand, where such refusal is an abuse of the court's discretion is reversible error.
6. Where, after the refusal of the court to require the state to place on the stand certain eyewitnesses of the homicide, the witnesses in question were introduced and fully examined on defendant's behalf, and it is not claimed that the prosecuting attorney acted unfairly in the matter, such refusal by the court worked no prejudice to defendant.

Appeal from District Court, Park County; Frank Henry, Judge.

MIKE ROLLA was convicted of murder in the second degree, and appeals. Reversed.

Smith & Wilson, for Appellant.

C. B. Nolan, for the State.

PEMBERTON, C. J.—In the month of April of this year the defendant was tried in the district court of Park county, under an information charging him with the crime of murder in the

first degree. He was convicted of murder in the second degree. From the judgment, and order of the court refusing a new trial, this appeal is prosecuted.

The evidence is presented in the record, but there is no contention that it does not authorize or support the verdict. The evidence is incorporated in the record for the purpose of illustrating errors assigned in the giving of instructions by the court. We shall therefore only refer to the evidence when necessary in the treatment of the case.

The counsel for appellant contends that the court erred in the giving of instructions to the jury. The instructions complained of are as follows: Instruction 6: "Before a person is justified in taking the life of his assailant, the slayer must not only exhaust all other reasonable means within his power consistent with his safety to prevent the homicide, but it must clearly appear that the person slain not only had at the time the apparent present ability, as well as the apparent intention, to kill or seriously injure the slayer, but that the deceased was then and there apparently in the act of carrying out his purpose to-wit, the intention of destroying the slayer, or of inflicting upon him serious bodily injury; and even then the law will not justify the slayer in the use of any more force than is actually necessary at the time to prevent the deceased from immediately carrying into effect such unlawful purpose. By this instruction the jury will understand that the right to take life is limited to the apparent actual and present necessities then suddenly precipitated by the assailant, under such circumstances as then appear to the slayer, as a reasonable man, to place the life or person of the slayer in such peril as to admit of no other reasonable alternative than the killing of the assailant; and even then the slayer's right to employ force against the assailant is limited to the force necessary to repel the violence then being offered, and place himself beyond the reach of immediate danger."

Instruction 9: "You are further instructed that, before a person can justify the taking of human life on the ground of self-defense, he must, when attacked, employ all reasonable

means within his power, consistent with his safety, to avoid the necessity for the killing."

Instruction 10: "You are further instructed that if you are satisfied from the evidence, beyond a reasonable doubt, that the defendant armed himself with a deadly weapon, and intentionally brought about the fatal meeting, or contributed thereto with the purpose of using his weapon in case of emergency, then the defendant would not be justified upon the grounds of self-defense, and you will bring in your verdict of guilty."

Instruction 11: "You are further instructed that if you find and believe from the evidence, beyond a reasonable doubt, that the defendant shot and killed Servius Cortese, as charged in the information, and that the killing was the result of a sudden, violent impulse or passion, caused by serious and highly provoking injury inflicted upon the defendant at the time by the deceased, which was sufficient in the minds of the jury to cause an irresistible passion in a reasonable person, and the interval of time between the provocation and the killing was not sufficient for the passion to cool, and the voice of reason and humanity to be heard, then the killing was manslaughter, not murder. But if you find from the evidence that a sufficient time had elapsed after the infliction of the injury or insult for the passion to cool, and the voice of reason and humanity to be heard, then the killing was murder."

Instruction 12: "The bare fear of the offense to prevent which the homicide is alleged to have been committed shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under the influence of such fears, and not with a spirit of revenge."

Instruction numbered 6 is complained of by counsel as being especially objectionable. It is contended that this instruction goes too far in imposing the obligation upon the accused to "exhaust all other reasonable means within his power consistent with his safety" to prevent the homicide before taking life. Counsel says this instruction required the accused to re-

treat, or disable, or attempt to disable, his assailant, before taking his life. An inspection of the instruction discloses the fact that the court placed great emphasis upon the obligation of the accused to "exhaust all other reasonable means within his power consistent with his safety to prevent the homicide." This view of the law is pressed upon the jury throughout the instructions. An instruction of this character was disapproved by the supreme court of California in *People* v. *Ye Park*, 62 Cal. 204. The court, in the case just cited, says, where a person is attacked with murderous intent, he is under no obligation to fly; "he may stand his ground, and, if necessary, kill his adversary." In *People* v. *Herbert*, 61 Cal. 544, the court say: "Upon the duty to retreat there was a contrariety of opinion by the writers of the common law, and this difference has found its way into the decisions of our states; some, as Alabama and Iowa, holding to the rule that retreat is necessary; others, as Indiana, Michigan and our own state, declaring for the contrary doctrine. But it is not stating it too strongly to say that the trend of the later judicial decisions is in favor of the latter rule. So that, while the killing must still be under an absolute necessity, actual or apparent, as a matter of law, that absolute necessity is deemed to exist when an innocent person is placed in such sudden jeopardy. The right to stand one's ground should form an element of the instructions upon the necessity of killing and the law of self-defense."

In *Rowe* v. *U. S.*, 164 U. S. 546, 17 Sup. Ct. 172, a case involving the principle under discussion, Mr. Justice Harlan, speaking for the court, says: "The accused was entitled, so far as his right to resist the attack was concerned, to remain where he was, and to do whatever was necessary, or what he had reasonable grounds to believe at the time was necessary, to save his life or to protect himself from great bodily harm. And, under the circumstances, it was error to make the case depend in whole or in part upon the inquiry whether the accused could, by stepping aside, have avoided the attack, or could have so carefully aimed his pistol as to paralyze the arm

of his assailant without more seriously wounding him." In the case at bar the accused claims that he was murderously attacked by the deceased and his brother, at or near his own home, and that under such circumstances he was under no legal obligation to fly or retreat. There is evidence in the record tending to support the claim that the accused was so attacked. We are inclined to the opinion that the instructions upon this phase of the case go too far in declaring it the duty of the accused to exhaust all other reasonable means in his power to prevent the homicide before taking the life of the deceased. (*State* v. *McCann* (Wash.) 49 Pac. 216; *People* v. *Hecker* (Cal.) 42 Pac. 307; *Beard* v. *U. S.*, 158 U. S. 550, 15 Sup. Ct. 962; *People* v. *Gonzales* (Cal.) 12 Pac. 783.)

In our opinion, the most serious objection to instruction No. 6 is that part of it which says: "By giving this instruction the jury will understand that the right to take life is limited to the apparent actual and present necessities then suddenly precipitated by the assailant, under such circumstances as then appear to the slayer, as a reasonable man, to place the life or person of the slayer in such peril as to admit of no other reasonable alternative than the killing of the assailant." We think this instruction ignores the right of the accused to act upon what appeared to him at the time, as a reasonable person, necessary to do to prevent death or receiving great bodily harm from the deceased. If it appeared to the accused at the time of the homicide, as a reasonable person, that it was necessary for him to slay his assailant in order to save his own life or prevent receiving great bodily harm, he had a right to act upon such appearances, and slay his assailant, although he was in no actual danger. The right of self-defense is not confined to cases of "apparent actual and present necessities then suddenly precipitated," etc. (*People* v. *Gonzales*, *supra*.) Such an instruction is misleading, ambiguous and contradictory.

What has been said above is applicable to the other instructions (they being so similar in terms) in so far as they transgress the views expressed in treating instruction No. 6.

It is claimed by the state that, "by other portions of the same instruction, and by instruction No. 28, the jury were specially instructed that the danger need not be real or actual, but only apparent," and that thereby the defect or error in instruction No. 6 was cured. We do not think the authorities support the position of the state. In *Clare* v. *People*, 9 Colo. 122, 10 Pac. 799, it is held that when conflicting propositions of law are given upon a material point, one correct and the other incorrect, the judgment will be reversed. It cannot be assumed in such case that the jury will follow the correct statement of the law. The court, as a general rule, cannot give all the law in a single instruction, and therefore the instructions must be considered all together; and, when so considered, they must correctly state the law, without contradiction. (*Territory* v. *Hart*, 7 Mont. 489, 17 Pac. 718; *Kelley* v. *Cable Co.*, 7 Mont. 70, 14 Pac. 633; *Heilbronner* v. *Lloyd*, 17 Mont. 305, 42 Pac. 853; Sackett's Instructions to Juries, Sec. 25; Thompson on Trials, Secs. 23–26.) The instructions given in the case at bar on the law of self-defense are contradictory, and for that reason fatally erroneous.

The appellant contends that instruction No. 11, in relation to manslaughter, is defective, as it does not properly distinguish manslaughter from self-defense. If there is any error or defect in this instruction, it may be remedied on a new trial by the court following and using the language of the statute defining manslaughter.

The counsel for appellant assigns as error the refusal of the court to require the prosecuting attorney to place upon the stand certain eyewitnesses of the homicide. The prosecuting attorney placed several of the eyewitnesses on the stand, but declined to put others on who had witnessed the tragedy, one or more of whose names were indorsed on the information. Section 2082 of the Penal Code reads as follows: "Upon a trial for murder or manslaughter it is not necessary for the state to call as witnesses all persons who are shown to have been present at the homicide, but the court may require all of such witnesses to be sworn and examined." Counsel contends

that this section does not abrogate the rule on this subject as established by this court in this jurisdiction. The cases decided by this court involving this question were all decided upon and by their own peculiar facts and circumstances. In *Territory* v. *Hanna*, 5 Mont. 248, 5 Pac. 252, the rule is not declared to be imperative. Considering the circumstances of the case, the court said: "The statement of the prosecuting attorney, in opening the case to the jury, in presence of the court, is an official statement, made under the solemnity of his official oath. In this statement the prosecuting attorney declared to the jury that Hannah Nelson, the wife of the deceased, was present at this homicide. The testimony on the part of the prosecution also showed that she was in a room adjoining that in which the homicide took place, immediately thereafter. Having stated officially to the court and jury that she was present at the homicide, and the proof showing that she was present immediately thereafter, and in all probability at the very act itself, the prosecuting attorney ought to have called this witness, or made some satisfactory explanation to the court why he did not; otherwise a suggestion is raised that there was design and purpose in omitting to call the witness. Especially should she have been called as there was no proof of the circumstances attending the killing in evidence at the time the motion was made."

If the prosecuting attorney in the case quoted from had made some satisfactory explanation of his refusal to place the eyewitness on the stand, it might have altered the case very materially.

In *State* v. *Russell*, 13 Mont. 164, 32 Pac. 854, this court said that the witness in question was not shown to be an eyewitness. We also said that the rule involved had been extended far enough in the Hanna case. In the case of *State* v. *Metcalf*, 17 Mont. 417, 43 Pac. 182, we said the opinion of the prosecuting attorney that a witness present at the homicide was at that time stupidly drunk was not a sufficient reason for not placing him on the stand. We held that under the circumstances, he being the only witness present, it was the duty

of the prosecutor to place him on the stand, and let the jury determine his condition, and whether he heard or saw anything of the homicide. We also in the Metcalf case, quoted with approval the following language from *Wellar* v. *People*, 30 Mich. 16: "In cases of homicide, and others where analogons reasons exist, those witnesses who were present at the transaction, or who can give direct evidence on any material branch of it, should always be called, unless, possibly, where too numerous." We also said in the Metcalf case: "We think, under the great weight of authority, that resort should not be had to circumstantial evidence in such cases, when it appears that direct proof can be reasonably had. The best evidence of which the case admits should always be introduced." We think the rule announced in these cases is, when properly considered, based upon and supported by the old and fundamental principle that the best evidence of which a case is susceptible should be introduced, or some satisfactory explanation given, whether circumstantial or direct.

We do not think the statute cited above makes it imperative that all the witnesses to a homicide should always be introduced by the state. It gives the court power to require it, if, in its judgment, such course should be pursued.

In *State* v. *Barrett*, 54 Pac. 807, a case involving this question, very recently decided by the supreme court of Oregon, that court said: "It is true, the prosecuting officer is supposed to be, and should be, wholly without bias or prejudice. His sole duty is to see that the laws are enforced, and the guilty punished. He is as much bound, as the law officer of the state, to protect the innocent as to punish the guilty; and if, therefore, at any time, he should, unmindful of his duty, endeavor to suppress evidence, the trial court would be justified in requiring the production by him of the evidence sought to be suppressed, although it might be more favorable to the defense than to the state; and a refusal to exercise such discretion would probably be ground for reversal. But no such question is presented here. There is no claim that the district attorney was endeavoring to suppress testimony, or to prevent any or all witnesses present at the time of the

commission of the alleged crime from appearing and testifying on the trial. The simple question was whether such witnesses should appear for the state, and thus not only give the defendant the right to cross-examine them, but deny to the state the right of impeaching them if it saw proper, or whether the district attorney might, in his judgment, refuse to call them, and thus compel the defendant to put them on the stand if they were to testify in the case at all. The witnesses were subsequently called by the defense, and testified fully in the case; so that defendant had the full benefit of their testimony, and could not possibly have been injured by the failure of the state to call them in its behalf."

The circumstances and facts of the case at bar with reference to the action of the prosecuting attorney and the court, and the introduction of the witnesses in question by the defendant after the action of the court, are precisely like those of the Barrett case. We think the action of the court in such case is largely a matter of discretion, especially under Section 2082 of the Penal Code. We think, if a proper case were made requiring the production of all the eye-witnesses to a homicide, and the court should abuse its discretion by refusing to order such witnesses placed upon the stand, it would be reversible error, as stated in the Oregon case, as well as under the section of the penal code quoted above. But, as in the Oregon case, we see no abuse of discretion in the case at bar. It is not pretended that the prosecuting attorney acted unfairly or in bad faith in the matter. Nor do we see how the accused could have been prejudiced by the action of the court, as the witnesses in question were introduced and fully examined on his behalf. What advantage could have accrued to the accused by a cross-examination of these witnesses that he did not obtain by examining them as his own does not appear to us.

We think the judgment should be reversed on account of the errors of the court in giving the instructions, and it is so ordered. The case is remanded for new trial.

Reversed and remanded.

HUNT and PIGOTT, JJ., concur.

21 591
22 462

M. COURTNEY, APPELLANT, v. MISSOULA COUNTY, RESPONDENT.

[Submitted Nov. 22, 1898. Decided Dec. 5, 1898.]

Sale of State Lands—Taxation Before Payment of Price.

State lands after sale, but before the price is fully paid, are subject to taxation as the property of the purchaser, notwithstanding Constitution, Article 12, Section 2, exempts the property of the state from taxation, and that the state retains the legal title as security for the deferred payments, since the purchaser is the owner, for the purpose of taxation, after he has entered into possession, paid a portion of the price, and contracted to pay the balance, as required by Political Code, Section 3480 *et seq*.

Appeal from District Court, Missoula County; F. H. Woody, Judge.

ACTION by M. Courtney against Missoula county. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

M. L. Cranch, for Appellant.

C. B. Nolan, for Respondent.

PIGOTT, J.—This was an action for the recovery of the amount of certain state and county taxes paid under protest by plaintiff to the treasurer of Missoula county, which was assessed against lands listed in her name, purchased by her from the state of Montana under a contract providing that no patent should issue until certain payments had been made. Defendant's demurrer to the complaint on the ground of insufficiency was sustained. Judgment was thereupon entered against the plaintiff, and she appeals.

We would be warranted in refusing to consider the appeal. The transcript was not prepared in accordance with the requirements of rules 8 and 9 of this court (44 Pac. viii). The brief of the appellant fails to specify any error relied upon, nor does it even purport to discuss the question raised by the record, and is barren of citation of pertinent authorities.

Counsel for defendant, however, has not objected in any way to these gross breaches of the rules; and we have therefore, with some hesitation, consented to entertain the appeal, and to refrain from visiting upon plaintiff the penalty deserved.

The single question in this case is, are state lands, after they have been sold and before the purchase price is fully paid, subject to taxation?

Plaintiff claims that the lands assessed, and upon which she paid the taxes, belong to the state of Montana, and that, therefore, the property was not subject to taxation. She invokes Section 2 of Article 12 of the Constitution, exempting from taxation the property of the state, and also a like provision of Section 3671 of the Political Code. These two provisions, she insists, exempt from any taxation land to which the state retains the legal title.

Exemption from taxation is a release from the obligation to contribute towards the support of the state. While the rule is that special tax laws are to be strictly construed against the state, and favorably to the taxpayer, upon the ground that neither person nor property may be subjected to special burdens without clear authority of law, yet the liability to general taxation is an incident to all land, and exemption, which is the exception, must be clearly made out; and those who claim under the exception must show that the property sought to be subjected to general taxation is within the terms of the exemption. (*Montana Catholic Missions* v. *Lewis & Clarke Co.*, 13 Mont. 559, 35 Pac. 2; *Tucker* v. *Ferguson*, 22 Wall, 527.) In this state all property is subject to taxation except that which is mentioned in the section of the constitution to which reference has been made.

Sections 3480-3483, 3485, 3490, 3491, 3733, Political Code, are indicative of the intent of the legislative assembly to subject state lands to the tax after a sale thereof and before the price has been fully paid. These sections provide, *inter alia*, that the lands belonging to the state must be sold to the highest bidder, and that the amount of the purchase money paid

at the time the bid is made must be at least 30 per cent. of the price. Within 24 hours after such sale the purchaser must make the first payment required, and must then execute a bond conditioned for the payment of the residue of the purchase money in seven equal annual payments, with interest at the rate of 7 per cent. per annum, in default of which the purchaser forfeits $100 for each lot so by him bought. The purchaser may, if he chooses, pay the whole amount of the purchase price at the time of the sale, or, it seems, at any time within the seven years. Upon production to the state auditor of a certificate, with receipt of the treasurer indorsed thereon for the entire amount due, the auditor must cancel the bond, and letters patent for the land must be issued. If any payment stipulated in the bond remains unpaid for one year after maturity, the board of state land commissioners may direct suit on the bond, or may again sell the land for the sum due; but such second sale shall not be made unless the occupation of the land has been abandoned for a year; and, in case such second sale be made, all previous payments shall be forfeited; and, if the sum due for principal and interest is not bid therefor at such second sale, the board may purchase the land for the state at the amount due, with the costs of sale.

Section 3491 reads: "Any lands sold, for five years after the sale thereof, must not be assessed at any higher valuation than the estimate upon which they are sold, unless improvements within that time have been made thereon, in which case the value of the improvements must be added to the estimate." Section 3733 is as follows: "On or before the first Monday in March in each year, the state land agent must make out and transmit to the assessor of each county where lands or lots lie that may have been sold by the state, for which certificates of purchase, patents or deeds have issued during the year preceding, certified lists of such lands or lots, giving a description thereof by divisions or subdivisions, or lots and blocks, together with the names of the purchasers thereof." For the purposes of taxation, "property" includes

"real estate," and within the definition of "real estate" is the possession of, claim to, ownership of, or right to the possession of, land. (Section 3680, Political Code.)

The obvious design of the legislature was to provide for the taxation of lands sold by the state immediately upon the sale, even though the state retained the legal title thereto. We think the sections mentioned are not reasonably susceptible of any other interpretation; and it is to be observed that section 3733 was enacted for the sole purpose of advising the several county assessors with respect to such lands as may have been sold by the state for which either certificates of purchase or patents have issued, to the end that such lands might be listed to the vendees and assessed.

Has the property of the state been taxed? We think not. In a certain and qualified sense, the land intermediate the making of the contract of sale and the payment of the entire purchase price is the property of the state, for the state retains the legal title to secure the payment of the deferred portions of the purchase price; but plaintiff, the purchaser, having entered into a valid contract to pay the consideration agreed upon and to accept title to the land, which the state, on its part, is bound to convey, and having entered into occupation and made partial payments, is the owner for the purpose of taxation. A question identical in principle with the one presented in the case at bar was before the supreme court of Nebraska in *Edgington* v. *Cook*, 32 Neb. 551, 49 N. W. 369, and the court, upon full consideration, answered the question as we do the one here presented. (See, also, *Prescott* v. *Beebe*, 17 Kan. 320; *Board* v. *Ruckman*, 57 Ind. 96; *Wells* v. *City of Savannah*, 87 Ga. 397, 13 S. E. 442; *Farber* v. *Purdy*, 69 Mo. 601; *Taylor* v. *Robinson*, 34 Fed. 678.)

Under our constitution and statutory provisions, the property of the state may not be taxed. The interest of the state in the land, anterior to payment of the full purchase price, is its property, and that interest in no wise has been affected by the assessment. The land was not taxed as the property of the state, but as the property of the plaintiff, the

purchaser, who is the beneficial owner. Let the judgment appealed from be affirmed, and it is so ordered.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

STATE OF MONTANA, RESPONDENT, v. DUDLEY N. DICKINSON, APPELLANT.

[Submitted Nov. 16, 1898. Decided Dec. 5, 1898.]

21	595
31	362
32	33
21	595
34	407
21	595
40	495

Criminal Law—Larceny by False Pretenses—Ingredients of Offense—Information—Evidence—Variance—Title and Possession—Jury—Disregard of Instructions—Cross-Examination.

1. In order to convict under Penal Code, Section 880, declaring guilty of larceny any person who, with intent to defraud the true owner of his property or to appropriate it to his own use, obtains from the possession of such owner, by false representation or pretenses, any money, it is necessary to prove that defendant obtained the money in question under circumstances showing that the owner parted with the title thereto, and not merely with the possession thereof.
2. In an information under Penal Code, Section 880, defining larceny by false pretenses, it was alleged that defendant falsely and fraudulently represented that he was a certain physician named, the discoverer of a certain specified remedy, and the founder and agent of the drug company by which it was manufactured and sold, and that by means of such pretenses he obtained from the possession of prosecutrix a certain sum of money, with intent, etc. Prosecutrix testified to the representations alleged, and also that she had been induced to call on defendant by means of his advertisement: that she believed in his ability to cure, from what she had been told respecting the physician whom he represented himself to be; and that she paid him the money demanded, relying on his "guaranty," and believing that he would return the money, as agreed, if he failed to cure. *Held*, that the evidence proved that prosecutrix had voluntarily parted with the title to the money in question on the faith of the representations made to her by defendant.
3. Under an information charging defendant with larceny by obtaining money by means of false pretenses, it was error to instruct that if defendant obtained the "possession" of such money, with intent to feloniously convert it to his own use, in manner and form as charged, such act would amount to larceny, though prosecutrix knowingly and intentionally parted with the possession thereof, "provided she did not part with the title to the same," as such instruction authorized a conviction of larceny, under such information, even where there was a taking against the will of the owner, notwithstanding the requirements of Penal Code, Section 1832, that an information must contain a statement of the facts constituting the particular crime charged.
4. On a trial for larceny by false pretenses it was error to instruct that, in order to constitute the crime charged, it was necessary that the owner should part with the possession only of his propeaty, relying on such false and fraudulent pretenses, and that

"If the owner, under such circumstances, parts with both the title and possession of such property, the act will not constitute larceny, and will not sustain a verdict of guilty," as proof of the two ingredients mentioned was indespensible to a conviction under an information charging such crime.

5. A conviction which is contrary to the law as given in the instructions to the jury must be set aside, however erroneous the instructions may be.

6. Where an officer of a company for which defendant, who was on trial under a criminal charge, had represented himself to be an agent, testified that defendant was not such agent at the time alleged, it was error to refuse to permit him to prove by such witness, on cross-examination, that the company in question had, shortly before the time alleged, constituted as an agent a person who appeared to be one and the same person with defendant, acting under a different name.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

DUDLEY N. DICKINSON was convicted of the crime of larceny by false pretenses, and he appeals. Reversed.

Toole, Bach & Toole, for Appellant.

C. B. Nolan, Atty. Gen., for the State.

HUNT, J.—Appeal from a conviction of the crime of grand larceny by obtaining money under false pretenses. The false pretenses alleged are "that on or about September 16, 1897, the defendant falsely and fraudulently represented and pretended to one Amanda Gray that he was the agent of the Veno Drug Company, a Pennsylvania corporation, and that he falsely and fraudulently pretended to the said Amanda Gray that he was one Veno, the founder and discoverer of the medicinal remedies manufactured and sold by the said Veno Drug Company, whereas in truth and in fact the defendant was not the agent of said company, and was not the said Veno, and the said representations were false, all of which the defendant then and there well knew," etc., "by means of which * * * and by color and aid thereof, the defendant falsely and fraudulently obtained from the possession of the said Amanda Gray, and deprived and defrauded her of, the sum of $87, * * * with intent to deprive and defraud said Amanda Gray, the true owner, of said money, and to appropriate the same to his own use, the said Amanda Gray then and there relying upon and believing said

representations and pretenses to be true; and so the said Dudley N. Dickinson did then and there, in manner and form aforesaid, * * * steal and carry away said money."

The information charged a violation of Section 880 of the Penal Code, which provides "that every person who with intent to deprive or defraud the true owner of his property, or to appropriate the same to the use of the taker, or of any other person, takes from the possession of the true owner, or of any other person; or obtains from such possession by color or aid of fraudulent or false representation or pretense, or of any false token or writing * * * any money; or having in his possession, custody or control as bailee, or agent authorized to take such possession, custody or control, any money, property or article of value of any nature * * * appropriates the same to his own use * * * steals such propproperty and is guilty of larceny."

The prosecuting witness, Amanda Gray, swore that she knew the defendant under the name of "Dr. Veno;" that she went to his office, in Butte, and that he said that he was Dr. Veno; that she wanted him to treat her daughter, who had stiffness of the muscles about the ankle; that the defendant said that he could not take the case for less than $87, and give a a guaranty of cure; that $50 was paid at once, which defendant accepted, but that he would not give a guaranty until the balance was paid; that she then paid the balance, whereupon the defendant gave her the guaranty, which is as follows: "Butte, Montana, Sept. 20, 1897. Dear Madam: We hereby agree to cure you of your ailment recorded in our books (case No. 844, series B), provided you thoroughly follow the instructions of our physicians, and take remedies prescribed. Veno Drug Company, Pittsburg, Pa."

The prosecuting witness further testified that defendant said when he gave her the guaranty that it was as good as a check on the bank, and that, if he did not cure her daughter, she would get her money back; that she took the paper, feeling that she would get her money back, if he failed to cure; that defendant had stated that he represented the Veno Drug Com-

pany; that in the Anaconda Standard, a few days previous to her interview with him, a long advertisement had appeared, in which the defendant advertised that he would lecture, and perform acts of marvelous healing, such as making rheumatic cripples walk, etc., that these acts would be performed by Veno, and that Veno would arrive in Butte to establish a permanent office, and to introduce "the great Veno remedies." Witness further said that she was influenced by this advertisement to interview the defendant, and that it was instrumental in inducing her to part with her money, because she believed Veno could help her daughter, and she believed at the time that defendant was Veno, as advertised; that she had heard his lecture, and believed that he was the agent of the Veno Drug Company; and that if she had not believed that he was Veno, and if he had not said that he knew he could cure her daughter, she would not have paid the money to him; that she had been told what a great man Veno was, and that she believed in his ability to cure; that she did not consider that she had loaned the man the money, but she did think she would get it back, because he told her, if he did not cure her daughter, he would pay it back.

On cross-examination the witness said that she considered that the money was hers, after she paid it to the defendant, until he cured her daughter, because the daughter was to be cured, and, if he did not cure her, witness was to get the money back—not the same bills, but the same amount as called for by the guaranty; that she did not know whether the attorneys questioning her would call it a loan or not; that she paid the money for the cure of her daughter, etc.

This evidence is conclusive of the fact that Mrs. Gray parted with the title to all the money paid to the defendant. It is immaterial what her own opinion as to the effect of the transaction might have been. We must view it according to the facts, and without regard to her idea of the legal attitude she placed herself in. She evidently believed the defendant to be Veno, believed that he represented the Veno Drug Company, believed that he was a great physician, and that he could cure

her daughter; but, with a doubt lurking in her mind, she wanted something by way of security in case this "marvelous healer" failed to effect the cure which he was about to undertake. Accordingly she asked for a guaranty, which was not given to her, however, until an additional payment had been made. This paper and the statements made upon its delivery satisfied her. If the defendant failed to cure, she could rely with perfect safety upon the agreement—so defendant adroitly told her, and upon his many assurances she seems to have foolishly relied. But that she ever retained title to the money handed to the defendant, or meant to retain her ownership thereof, is entirely contrary to her evidence of what was said and done. The transaction was plain. Mrs. Gray simply parted with her money upon the faith of the representations made to her by the defendant. She did so willingly; more willingly than she might otherwise have done, because she procured what she thought would save her harmless, if her daughter was not cured.

To this evidence of Mrs. Gray we now apply the law. In order to convict defendant of the crime of larceny by obtaining the money under false pretenses, it was necessary to prove that he obtained Mrs. Gray's money under such circumstances that the prosecutrix meant to part with her title to the money obtained, and not merely with her possession of it. (3 Greenleaf on Evidence, Sec. 160; 2 Wharton on Criminal Law, Sec. 1179; 3 Archibald's Criminal Practice, 467; *Com.* v. *Eichelberger*, 119 Pa. St. 254, 13 Atl. 422; *State* v. *Watson*, 41 N. H. 533; McClain's Criminal Law, 563; Clarke's Criminal Law, 279; *Smith* v. *People*, 53 N. Y. 111.) The evidence of Mrs. Gray was, therefore, competent, under the allegations of the information, and under the law applicable to the crime charged. It tended to prove the facts pleaded, and made a strong *prima facie* case of defendant's guilt.

But the district court entertained a different theory of the law of larceny by false pretenses. The instructions demonstrate this. For example, the jury were charged that "if defendant obtained the possession of the money * * * with

intent to feloniously appropriate the same and convert the same to his own use, in manner and form as charged," then this would amount to larceny, notwithstanding Mrs. Gray knowingly and intentionally parted with the possession of the money, "provided she did not part with the title to the same, but intended that the money should be returned to her, if her daughter was not cured." This instruction, in effect, directed the jury that they could convict of the crime of larceny, even where there was a taking against the will of the owner, under an information charging defendant with larceny by obtaining money under false pretenses. This was wrong. Under the statute (Section 1832, Penal Code), it is necessary for an information to contain a statement of the facts constituting the crime charged, in ordinary and concise language. Here the facts stated were sufficient, if proved, to constitute the crime of larceny by one, and but one, of the statutory ways by which larceny may be committed. There could not be, however. under this information, a conviction of larceny where the facts involved a trespass and a felonious taking against the will of the owner, inasmuch as such a state of facts, if proved, would constitute a fatal variance between the information before us and such proof. In *People* v. *Dumar* (N. Y.) 13 N. E. 325, the court of appeals considered this very question, under the statute of that state, wherein larceny is defined in the same way as in Montana. Discussing a case where the indictment was for larceny of the first degree, by feloniously stealing, taking and carrying away the property of another, but where the proof was that defendant obtained the property from the possession of the true owner by false representations, Judge Danforth said: "The important difference between the former law and the present, so far as this case is concerned, is that the court is no longer called upon to decide whether an offense is larceny, embezzlement or false pretenses; nor is justice liable to be defeated by too nice a discrimination. Each of these acts is larceny. But the general principle of pleading has not been substantially changed. Under either system an offense consists of certain acts done or omitted under certain

circumstances; and under neither is any indictment sufficient which does not accurately and clearly allege all the ingredients of which the offense is composed, so as to bring the accused within the true meaning and intent of the statute defining the offense. Under the former this end was secured by rules formulated and applied by the courts through long series of decisions; under the latter it is made imperative by the provisions of the statute. In the case at bar the defendant was left uninformed of the real act committed by him, and sub jected to the charge of larceny for an act which he did not perform. The variance is fatal to the proceeding." This rule has been followed in the later case of *Peop'e* v. *Jeffery*, 14 N. Y. Supp. 837. So, in larceny, under the Montana statute, where a prosecutor relies upon allegations that the crime was commited by obtaining money under false pretenses, he will be held to evidence tending to prove guilt by that method alone; and he cannot secure a conviction of larceny involving a trespass, or a larceny committed in any other way than that pleaded.

Again, as the court advanced another step in the law it committed further serious error. Thus, it instructed that, in order to constitute larceny by means of the aid of fraudulent or false representations or pretenses, it was necessary that the owner part with the possession of his property, relying upon such false and fraudulelnt pretenses, and that in so doing he part with the possession only of such property. "If the owner, under such circumstances," said the court, "parts with both the title and possession of such property, the act will not constitute larceny, and will not sustain a verdict of guilty." "And in this case," added the court, "if you believe from the evidence that the accused, Dudley N. Dickinson, took from the possession of the said Amanda Gray the property in question, as alleged in the information, by means of the false representations and pretenses as therein alleged, yet if you find that, at the time the defendant so took the said property, the said Amanda Gray intended to part with, and did part with, both title and possession of the said property, then the

defendant is not guilty of the crime of larceny, and you should acquit him, and your verdict should be not guilty." The first clauses of this instruction were radically wrong, in that they misdirected the jury as to the ingredients of the crime charged, by telling them that where the owner of the property parts with title and possession, there can be no conviction of larceny by obtaining the property under false pretenses. What we have heretofore said, and the authorities cited, cover this point. Then, emphasizing the error noticed, by applying the inaccurate rules laid down, the court proceeded to direct the jury to acquit the defendant, if the prosecutrix parted with both title and possession of her money; that is to say, the jury were to acquit if they found from the evidence the existence of those two ingredients which were really indispensable to a conviction of the crime charged, and without proof of which defendant could under no circumstances be legally convicted under this information. Inasmuch as Mrs. Gray proved by her own undisputed evidence that she had parted with both the title and possession of the money paid to defendant, no instruction involving an inquiry by the jury into that matter should have been submitted at all. There was only one way that they could find on it under the evidence; and, when they found that she had parted with title and possession, there was only one verdict they could consistently render, for they were positively charged, under such circumstances, to acquit the defendant. The jury, however, refused to obey the charge, and convicted defendant in the face of the instructions of the court. For this reason, therefore, as well as because of misdirection in the law, the conviction must be set aside, and a new trial ordered.

Under our system the court is judge of questions of law; the jury, of questions of fact. They cannot find against the instructions. The duty of a jury is to apply the law given them by the court, whether or not it conforms or is counter to their wishes or ideas. Juries are the exclusive judges of the credibility of witnesses testifying to facts, and in the determination of disputed questions of fact they may exercise great latitude, within the limits of the evidence before them;

but they are bound close and fast by the law as the court gives it to them in its charge, and no matter how erroneously it may be stated, or may be thought to be, or how unjust the result of applying it may seem to the jury, their responsibility is not for the law so given, but begins and ends by applying it as so given to the facts as found by themselves. This doctrine was well announced by Chief Justice Pemberton, for the court, in *Murray* v. *Heinze*, 17 Mont. 366, 42 Pac. 1057, and 43 Pac. 714.

Another error is prominent. A witness named Varney, called by the state, testified that defendant was not the agent of the Veno Drug Company, of Pittsburgh, Pa. The witness was the secretary and treasurer of the Veno Drug Company, and swore that he was in a position to know who were and who were not the agents of this corporation, and that he did know that defendant was not one at the time alleged. Upon cross-examination, defendant's counsel sought to prove that, shortly before the time of the commission of the alleged offense for which the defendant was on trial, the Veno Drug Company entered into a contract authorizing one D. N. Dodge, or D. N. Dickinson, who appeared to be one and the same person with the defendant, to sell the medicines of the Veno Drug Company. The state objected to this line of examination, and the court sustained the objection because the defendant could not make out his defense on cross-examination. Surely, if it was competent for the state to introduce proof of the allegation that the defendant did not represent the Veno Drug Company, it was equally competent for the defendant, by cross-examination, to disprove the truth of the statements of Varney by eliciting from him admissions of a most material nature tending to prove that defendant had a contract of agency with the Veno Drug Company, and that the witness knew that he had such contract of agency, although it had been entered into by defendant acting under a name other than Dickinson. Judgment reversed, and cause remanded for new trial.

Reversed and remanded.

PEMBERTON, C. J., and PIGOTT, J., concur.

INDEX.

ASSIGNEE.

For leave to sue, see PLEADINGS.

ASSIGNMENTS.

See MORTGAGES—FRAUDULENT CONVEYANCES.

ATTACHMENTS.

See CONTRACTS—PLEADINGS.

On an appeal from an order denying an application to discharge a writ of attachment which is heard wholly upon affidavits, the Supreme Court will review the evidence.—*Wilson* v. *Barbour*, 176.

The complaint stated seven separate and distinct causes of action upon contract for the direct payment of money. Each cause of action was one upon which plaintiff might have obtained a writ of attachment. An affidavit for an attachment was filed, which stated all the facts necessary to entitle the plaintiff to a writ of attachment as to each of five of the causes of action, and the statement as to each of the five was complete in itself. As to the other two causes of action, the affidavit was defective, because it did not state that the debts mentioned therein had not been secured, or, if ever secured, that the security had become valueless. *Held*, that a writ of attachment which stated separately the amount of the demand in each of the five causes of action properly stated, also that each of the remaining two, and also the aggregate amount of all the claims, was irregular but not void; and voidable only so far as it included the demands in the two causes of action referred to.—*Id.*

Where a writ of attachment has been issued upon an affidavit which is sufficient as to five of seven causes of action, but insufficient as to the remaining two, a motion to discharge the whole writ is properly denied.—*Id.*

A lien on personal property capable of manual delivery, in possession of a transferee under a conveyance alleged to be fraudulent as to creditors, is not acquired by service of garnishment on the transferee, since the Code of Civil Procedure (Compiled Statutes of 1887) Section 186, Subdivision 3, provides that personal property capable of manual delivery shall be attached by taking it into custody.—*Wilson* v. *Harris*, 274.

Property of a debtor, subject to execution, in possession of an assignee under a conveyance void as to creditors, may not be reached through proceedings in equity until such creditors have obtained a specific lien on the property.—*Id.*

Code of Civil Procedure (Compiled Statutes of 1887) Section 188, providing that the sheriff, on receiving information in writing that any person has personal property of defendant in his possession, shall serve on such person a copy of the writ, and notice that the property is attached, and Section 190, providing for the examination under oath of one in possession of a debtor's property capable of manual delivery, and empowering the court to order same delivered to the sheriff, whose duty it would then be to attach the same, do not authorize the garnishment of a transferee of property capable of manual delivery under a conveyance fraudulent as to creditors.—*Id.*

ATTORNEY.

Stipulations of, see PRACTICE.

Section 402 of the Code of Civil Procedure, provides that an attorney may be removed when he has been convicted of a felony or misdemeanor involving moral turpitude, and that in such a case the record of conviction shall be conclusive evidence; Section 417, *Id.*, provides that, when an attorney has been convicted of such a crime, the clerk of the court shall, within thirty days thereafter, transmit to the Supreme Court a certified copy of the record of conviction; Section 418 provides that, in such cases, the proceedings to remove must be taken by the Supreme Court upon receipt of the certified copy of the record; in the case under review the attorney had been found guilty of the crime of secreting a public record, which is a felony. *Held*, that it was not necessary to file any complaint, or to issue or serve any citation in the proceeding.—*In re Bloor*, 49.

the matter sought to be reviewed affects the people generally, and the object of the writ is to inquire into the performance of a duty owing to the public.—*State* v. *Buck*, 469.

Where a board of county commissioners, in pursuance of Political Code, Sections 4157, 4158, decides whether a petition presented to them for the submission of the removal of the county seat to the electors of the county is signed by a sufficient number to require them to submit the question to an election, it exercises judicial functions, within the meaning of the Code of Civil Procedure, Section 1941, providing that a writ of review may be granted when an inferior board, exercising judicial functions, has exceeded its jurisdiction.—*Id.*

An affidavit for a writ of *certiorari* to review a decision of county commissioners that a petition was signed by the required number of electors to justify their submitting the question of removing the county seat to an election stated that the board refused to receive evidence of the right of the persons signing the petition; that there was no evidence of the number of signatures required, nor of how many signers were qualified; but it was not stated that objection was made to the petition, nor that any evidence was offered, nor that the board was not advised of the number of signatures required. It also stated that before the petition was acted on the affiant's offer of evidence that a large number of signers was disqualified was rejected, but it did not indicate that, if the evidence was allowed, it would reduce the number qualified to less than was required, nor show that affiant objected to the petition while it was pending before the board, though he had opportunity to attack it. *Held*, the affidavit was insufficient where the petition bore the required number of names, and recited that the signers were qualified, since, in the absence of an objection and of fraud, which did not appear, it indicated that the board had regularly pursued its authority, and by Code of Civil Procedure, Section 1947, the review on such a writ was to determine whether they had or not.—*Id.*

CHATTEL MORTGAGES.

In order to renew a chattel mortgage, it is not necessary to state in the affidavit (provided for in Section 1542, Fifth Division of the Compiled Statutes) that the mortgage is extended; it is sufficient, in that respect, if the affidavit states the amount of the debt justly owing at the time of filing the affidavits and the time to which the payment of the debt is extended.—*Cope* v. *Minn. T. F. Co.*, 18.

CITIZENS.

Citizens of the United States who have left their former residence without intending to return, and with the intention of residing in Montana, are citizens of that state. (Sec. 71, Political Code.)—*Donovan* v. *Smith*, 344.

CLAIMS.

Against State, see CONSTITUTION.

COAL MINES.

See CONSTITUTION.

COLLATERAL ATTACK.

See RECEIVER—PRINCIPAL AND SURETY.

COLLATERAL SECURITY.

See NEGOTIABLE PAPER.

CONDITIONAL SALES.

The predecessor in interest of the defendants agreed, in writing, with the plaintiff, that he had hired of plaintiff certain personal property, for which he agreed to pay the

sum of $649 as rent, as follows: $50 per month until the full amount with interest should be paid. It was further provided in the agreement that the title should not pass until the sum above mentioned had been paid, that in case of default in payment plaintiff might take possession of the property, and that all money theretofore paid should be forfeited as damages for the use of the property. *Held*, that, upon default in payment, plaintiff was entitled to the possession of the property.—*Sanford* v. *Gates, T. & Co.*, 277.

CONSTITUTION.

See CORPORATIONS—PLEADING AND PRACTICE (Criminal)—RAILROADS—STATUTE OF LIMITATIONS.

Ordinance 1, Section 24 and Article 11, Section 1, which provides for the establishment and maintenance of a general, uniform and thorough system of public, free common schools, does not prohibit the enactment of a law classifying school districts for the purposes of the election of trustees according to population, so long as the law provides for a reasonable classification and is reasonable and uniform in its operation and effect upon all districts within the same classification—although at the time of the passage of the act, only a few districts would be included within the law.—*State* v. *Long*, 26.

A law which classifies school districts according to population and provides a system for the election of trustees which is uniform for all districts within the same class is not a local or special law within the meaning of Section 26, Article 5, of the Constitution, although the law provides that the elections in the different classes shall be held under different supervision.—*Id.*

The title of a bill was as follows, "An act to amend Sections 1770 and 1782 inclusive, of Article 4, Chapter 6," etc. *Held*, that the title fairly stated the subject of the legislation, and that the omission to specifically enumerate the intermediate sections did not make the bill invalid as to them. *Id.*

An election law which provides that a resident of the district who is not a citizen of the United States may register upon his taking an oath that he is entitled to become a citizen of the United States, and that it is his honest intention to become such before the school election day of that year, is not in violation of Section 2, Article 9, of the State Constitution, which provides that no person except citizens of the United States shall have the right to vote.—*Id.*

The court refused to decide whether that section of the law which fixed the term of office at three years is in violation of Section 6, Article 16, of the State Constitution, which provides that "The Legislative Assembly may provide for the election or appointment of such other county, township, precinct and municipal officers as public convenience may require, and their term of office shall be as required by law, not in any case to exceed two years, etc." *Held*, however, that, even if that section is in violation of the section of the constitution referred to, the remainder of the act is not thereby rendered invalid; but, as the part fixing the term is severable, the law is valid for the terms prescribed, not in conflict with the constitution.—*Id.*

Held, further, that, even if one section of the act could be construed to be an attempt to increase the salary of the trustees who held over, and therefore, in violation of Section 31, Article 5, of the Constitution, the remainder of the act, including the provision for the election of new trustees, would not thereby be rendered invalid.—*Id.*

Section 5, Article 3, of the Constitution provides that "All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." The act of 1897 provides for not less than two nor more than five polling places in districts of the first class. It appeared that the facilities were somewhat inadequate to accommodate those who wished to vote; but it further appeared that those who were not able to vote did not attempt to do so until the latter part of the day. *Held*, that the law would not be held to be in conflict with the section of the constitution referred to.—*Id.*

Section 27, Article 5, of the Constitution provides that "the presiding officer of each house shall in the presence of the house over which he presides sign all bills and joint resolutions passed by the Legislative Assembly immediately after their titles have been

publicly read, and the fact of signing shall be at once entered upon the journal. The bill in question bore the signature of the presiding officer of each house, but the journal omitted to show that the bill was signed as required; it was not claimed, however, that the bill was not duly signed. *Held*, that the presumption is that the legislature and the presiding officers did their duty, and that the bill was regularly passed.—*Id.*

Section 4061 of the Political Code, which imposes a license upon banks and banking institutions doing business in this state, does not conflict with Section 11 of Article 15 of the State Constitution, which provides that "no company or corporation formed under any other country, state or territory, shall have, or be allowed to exercise or enjoy within this state any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of the state," although national banks are not subject to the license.—*State* v. *Thos. Cruse Bank*, 50.

The annual net proceeds of coal mines acquired under the laws of the United States relative to the acquisition of coal lands, are subject to taxation under Section 3, Article 12, of the State Constitution, and Section 3672 and Section 3760 *et seq.* of the Political Code.—*Montana C. & C. Co.* v. *Livingston*, 59.

In interpreting the Constitution, effect must, if possible, be given to every section and clause.—*Id.*

The Legislative Assembly, having the power to create new counties, may, as an incident to the creation, appoint provisionally, in the act creating a new county, the officers, including commissioners.—*State* v. *Mayhew*, 93.

Constitution, Article XVI, Section 4, provides that there shall be elected in each county, county commissioners to serve for a term of four years. Act of Feb. 16, 1893, created Ravalli county, and named three persons as county commissioners to serve until the next general election in 1894. *Held*, that the officers then elected were entitled to serve for the full constitutional term, which begins at the first general election succeeding the creation of the county, and is not computed quadrenially from the adoption of the constitution in 1889.—*Id.*

Where the act creating a new county also named persons to act, who did qualify and act as its officers until their successors were elected, no vacancy in such offices existed on the passage of the act creating them.—*Id.*

Under Constitution, Article VIII, Section 17, and Code of Civil Procedure, Section 38, abolishing terms of court in judicial districts composed of one county, and Sections 1720, 1722, 1723, providing a method for review of judgments by motion for a new trial and by appeal from order denying or granting the same, or from final judgment, and not otherwise, a court in such districts, having regularly made an appealable order, has no power to set it aside on its own motion; it not having been made inadvertently or improvidently.—*Whitbeck* v. *Mont. Cent. Ry. Co.*, 102.

The title of the act of March 4, 1897, is as follows: "An act to provide for the organization, regulation, etc., of building associations." No reference was made in the title to existing corporations; but the act provided that such corporations should not be affected by the law, unless they elected to come within its provisions. *Held*, that the act as to this clause was not in conflict with Sec. 23, Art. V of the Constitution, which provides that "no bill shall——be passed containing more than one subject which shall be clearly expressed in its title."—*Home B. & L. Asso.* v. *Nolan*, 205.

Held, further, that the clause of the act providing that corporations theretofore existing should not be affected by its terms unless they so elected is not in conflict with Section 26, Art. V, of the Constitution, which prohibits the Legislative Assembly from passing (among others) any special or local laws chartering loan and trust companies.—*Id.*

Laws of 1897, page 58, provides for the issuance of bonds to create a fund for the erection of state university buildings, and creates a building commission, who have authority to draw their warrants on the state treasurer for sums due any building contractor, and the state treasurer is required to pay them out of said fund. *Held*, that a warrant drawn by the commission in favor of a contractor need not be passed on by the State Board of Examiners created by the Constitution, Art. VII, Sec. 20, which provides that no claims against the state shall be passed on by the legislature without

first having been approved by the board, since the university bond fund is a trust fund entirely different from one arising from taxation, and is not a state fund over which the Board of Examiners would have control.—*State* v. *Collins*, 448.

Constitution, Article VIII, Section 17, provides that, unless otherwise provided by law, district judges shall fix the terms of court in districts composed of two or more counties; and Code of Civil Procedure, Section 38, requires the district judge in districts composed of more than one county, within a stated time, to fix the terms of court to be held in each county of the district during the ensuing year, and provides that no change in the time of holding any of the terms so fixed shall be made, but that a term may be adjourned to a future date. *Held*, that an order fixing the terms of court in a district composed of more than one county, made within the prescribed time, cannot, even within the time allowed the judge for fixing the terms of court, be revoked and the terms originally fixed changed.—*State* v. *Bristol*, 578.

CONTEMPT.

See RECEIVERS.

CONTRACTS.

For agreement to devise, see DISTRICT COURTS—EASEMENTS—Modification of, see LEASE—SPECIFIC PERFORMANCE—WATER RIGHTS.

In an action to reform a contract by the terms of which a plaintiff had agreed to pay to the defendant the amount which should be found due to him from one "C," the complaint alleged that the contract was made with the mutual understanding that plaintiff was not the guarantor for the payment of any indebtedness which might so be found to be due, and that he was not to pay any sum in excess of his indebtedness to "C;" the complaint did not allege any mistake, mutual or unilateral, in the making of the contract, or any mistake or inadvertence made in reducing its terms to writing. *Held*, that the complaint did not state facts sufficient to constitute a cause of action.—*Gafney Mer. Co.* v. *Hopkins*, 13.

Sheep were leased under two separate leases. The first lease provided that, at the end of the term, the lessees were to return to the lessors the original band and half the increase, and to make good any loss in the original band in excess of 15 per cent. Both leases provided that the title to both bands and the increase should remain in the lessors during the term of the lease until the sheep were redelivered to the lessors. The lessees having suffered a severe loss in the first band and being in financial difficulties, surrendered to the lessors the band included in the second lease and 58 more than they were entitled to under the terms of the first lease, it being understood that the latter should be kept to make good any loss found to exist in the first band when the final division should be made in accordance with the terms of the lease. *Held*, first, that the title to the sheep remained in the lessors until final division took place. Second, that neither of the lessees could sell the sheep and that the same were not subject to an execution against their property.—*Sweeney* v. *Darcy*, 188.

A party to a contract cannot have a rescission thereof, unless he offers to return all that he has received thereunder, or shows some valid excuse for his failure so to do.—*Sanford* v. *Gates, Townsend & Co.*, 277.

A contract which does not express the true intention of the parties, may be reformed at the request of a party thereto who, although he understood the terms thereof, was led to sign it by the fraudulent misrepresentations of the other party upon which he relied.—*Id.*

A party to a written contract who claims that it does not correctly state the true terms of the agreement, and that he was led to sign the same by the fraudulent misrepresentations of the other party thereto, cannot recover upon the oral agreement, but must first have the written agreement reformed; recovery cannot be had upon an oral agreement differing in its terms from the written evidence of it made by the parties.—*Id.*

To warrant the reformation of a contract because of deceit by means of false represen-

tations, it must appear that the party seeking the reformation was induced by the false representations to enter into the contract.—*Id.*

Under Section 2210 of the Civil Code, which provides that technical words in a contract are to be interpreted as usually understood by persons in the profession or business to which they relate, witnesses who are qualified may testify as to the meaning of the following words in a mining lease, "there shall be no ores stoped, except at the 800 foot level, and all ores shall be extracted from the drifts, raises or winzes."—*Cambers* v. *Lowry*, 478.

CORPORATIONS.

See INJUNCTIONS—RAILROADS.

Where a complaint by a creditor of a corporation to enforce a stockholder's statutory liability unnecessarily alleges actual fraud on the part of defendant, the allegation will be treated as surplusage, and plainliff may recover on proof of proper allegations of fraud in law, no motion to correct the pleading being made.—*Kelly* v. *Clark*, 291.

Since Comp. St. 1887, Div. 5, C. 25, Sec. 457, providing that stockholders shall be individually liable to creditors to the amount of their unpaid stock for all acts of the company until the whole amount of stock subscribed for shall have been paid in, prescribes no remedy, a judgment creditor whose execution against the corporation has been returned *nulla bona* may go into equity to obtain relief against the stockholders.—*Id.*

Under Const. Art. 15, Sec. 10, providing that no corporation shall issue stock except for labor done or money and property actually paid, and all fictitious increase of stock shall be void; and under Comp. St. 1887, Div. 5, C. 25, Sec. 457, providing that stockholders shall be individually liable to creditors to the amount of their unpaid stock for all acts of the company until the whole amount of stock subscribed for shall have been paid in; and Section 458, providing that the trustees of a company may purchase mines and issue stock to the amount of the value thereof, in payment thereof, which shall be taken as full paid stock, and not liable to any further call—the purchase of a mine which the stockholders knew was worth not over $125,000, and payment therefor in stock whose par value is $7,500,000, which is repurchased by the stockholders with full knowledge of the transaction at 2⅓ per cent. of its par value, is fraudulent as to a creditor, and the stock will be treated as unpaid to the extent of the difference between the actual value of the mine and the nominal value of the stock.—*Id.*

One accepting mining stock issued to him with knowledge that it was issued for a mine worth only about 1⅔ per cent. of the total stock subscribed cannot escape liability to creditors for the unpaid balance on the ground that he did not sign the stock subscription list.—*Id.*

Under Comp. St. 1887, Div. 5, C. 25, Sec. 457, providing that stockholders shall be individually liable to the amount of their unpaid stock for all acts and contracts of the company until the whole amount of stock subscribed for shall have been paid in, a holder of such unpaid stock is liable for the torts of the corporation.—*Id.*

The statute of limitations (Comp. St. 1887, Div. 1, Sec. 42) does not begin to run against a stockholder of a corporation liable on unpaid stock for a tort of the corporation, until the creditor has liquidated his claim, or reduced it to judgment, and failed to make it against the corporation, unless it appears to be useless to proceed against the corporation.—*Id.*

Corporations are bound only by the acts and contracts of their agents within the scope of their authority. There is no presumption that the general manager of a corporation has authority to grant a right of way over land belonging to it; and the burden of proving such authority is upon him who asserts a right to the easement.—*Butte & B. C. M. Co.* v. *Mont. O. P. Co.*, 589.

The directors of a corporation organized another corporation in another state, and transferred the entire property of the former to it, in consideration of the second corporation delivering its entire stock to the former, and assuming its liabilities. Having obtained the consent of the holders of more than three-fourths of the stock of the first corporation to such transfer, they executed another conveyance, in confirmation

of the first, and delivered possession to the new company. They then obtained an irrevocable power of attorney from the holders of three-fourths of the stock, authorizing such stock to be voted in favor of a ratification of the transfer, called a stockholders' meeting to ratify such transfer, and a protest against it by minority stockholders was disregarded. *Held*, that minority stockholders were entitled to enjoin ratification of the transfer without proof that they had without avail exhausted their remedies within the corporation.—*Forrester* v. *B. & M. M. Co.*, 544.

The ratification by a majority of the stockholders of an illegal and incomplete transfer of the corporate property may be enjoined by stockholders who acquired their stock after such transfer was made.—*Id.*

The determination of questions of fact on motion for preliminary injunction will not be disturbed on appeal, unless clearly against the evidence.—*Id.*

The fact that minority stockholders of a corporation waited until the day preceding the time set for the ratification by a majority of the stockholders of an illegal and incomplete transfer of the corporate property before suing for injunction was not *laches*. *Id.*

Nor was it a waiver of their rights.—*Id.*

An injunction *pendente lite* to restrain majority stockholders of a corporation from ratifying an illegal transfer of the corporate property, and one that is *ultra vires*, made by the officers and directors, will not be refused because the corporation offers a bond; since a stockholder is entitled to restrain the illegal transfer of the corporate assets as of right.—*Id.*

At common law the directors or a majority of the stockholders of a prosperous corporation able to achieve the object of its creation cannot sell or otherwise dispose of all the property without the consent of all the stockholders.—*Id.*

Compiled Statutes 1887, Div. 5, Secs. 492-494, providing that the officers of a mining corporation shall have no power "to sell * * * or otherwise dispose of" the whole or part of its mining grounds, mills and plant, without such transfer being first approved by the holders of two-thirds of the stock, at a meeting at which at least three-fourths of the stock is represented, and that if such sale be of the entire corporate property, the corporation shall be dissolved, is merely a limitation of the common-law powers of directors and majority stockholders of corporations, and does not authorize two-thirds of the stockholders of a prosperous corporation to sell all of its property against the protest of any other stockholder.—*Id.*

Conceding that said provisions enable a prosperous corporation to sell all its property without the unanimous consent of the stockholders, they do not authorize either a disposal thereof without a pecuniary consideration, or an exchange.—*Id.*

A transfer of all the property of a corporation to a foreign corporation organized by the directors of the former to acquire its property, in consideration of the latter assuming the liabilities of the former, and agreeing to deliver to it its entire capital stock, stockholders of the former to exchange their stock for shares in the new corporation, or in lieu thereof to receive a fixed sum per share for surrendering them, is neither a sale nor an exchange, within said provisions, conceding a sale or exchange to be authorized thereby.—*Id.*

The bona fide purchaser of stock may enjoin the ratification of an illegal transfer of corporate property which was *ultra vires* and made before his purchase, the former owners of the stock never having acquiesced in the transfer.—*Forrester* v. *B. & M. M. Co.*, 565.

COUNTERCLAIM.

See PLEADINGS.

COUNTIES AND COUNTY COMMISSIONERS.

See CERTIORARI—CONSTITUTION.

COUNTY SEAT.

See CERTIORARI—PLEADINGS.

COUNTY TREASURER.

See TAXATION.

COURTS.

See DISTRICT COURTS—CONSTITUTION—JUSTICES' COURTS.

CREDITOR'S BILL.

See PLEADINGS.

CRIMINAL LAW.

See PLEADING AND PRACTICE (Criminal).

Section 2109 of the Penal Code provides that upon a trial for larceny of money, notes, certificates of stock, etc., the allegation of the information, so far as regards the description of the property, is sustained, if the offender be proved to have embezzled or stolen any money, bank notes, etc. *Held*, that larceny is included in the crime of robbery, and that in a prosecution for robbery it was not error to instruct the jury in accordance with the above law concerning the proof of the property alleged to have been taken.—*State* v. *Rodgers*, 143.

In a criminal action for carrying on the business of a pawnbroker, which is a misdemeanor under the statute, the evidence tended to show that defendant frequently loaned money to persons upon the pledge of personal property as security, and that they had a right to redeem the property so pledged by paying the sum borrowed with interest; the defendant claimed that he bought the property referred to and sold the same back to the owners. *Held*, that the finding of the court that the defendant was guilty would not be disturbed.—*City of Philipsburg* v. *Weinstein*, 146.

In October, 1896, defendant bought a house, took possession of and occupied the same until Feb. 2nd, 1897, on which day one "G," in the temporary absence of the defendant, went to the house and placed an extra lock on the door; upon defendant's return a difficulty arose between him and "G," during which "G" struck him with a hatchet. On Feb. 3rd defendant went to the house, removed some personal property of "G's" and then shut and fastened the door; at that time "G" returned to the house and broke open the door; thereupon the defendant made the assault complained of. The court charged the jury as follows: "By 'possession' is not meant a mere temporary and passing occupancy of lands or tenements, but it must be of a lasting, permanent or substantial nature. A person entering on lands during the temporary absence of the owner or person in possession does not thereby acquire a possession of the premises or lands so entered upon." *Held*, that the instruction was erroneous. It is not the law that a person can defend only a lasting, permanent or substantial possession. A person may have a lawful possession, such as he may defend, which is not lasting or permanent.—*State* v. *Howell*, 165.

Held, also error under the above facts to instruct the jury that if they found that "G" was in possession of the building on Feb. 2, and that during his temporary absence on the day following, defendant entered therein—such entry was not sufficient to constitute possession.—*Id.*

Held, that the evidence shows that the defendant had been in possession of the premises, as owner thereof, for months, and that under Subdivision 3, Section 404, of the Penal Code, he had the right to defend such possession, provided he used no more force than was necessary for that purpose; and that it was error to refuse an instruction to that effect.—*Id.*

DEFAULT.

See JUDGMENTS.

DISBARMENT.

See ATTORNEYS.

DISTRICT COURT.

Under Section 11, Article VIII, of the State Constitution, which provides that District Courts "have original jurisdiction in all cases in law and equity where the claim is for fifty dollars or more," the District Court, sitting as a court of equity, has jurisdiction to try and determine an action brought against an estate of a decedent to enforce an agreement made by deceased to devise a certain share in his property. Jurisdiction in such cases is not confined to the District Court sitting as a court of probate.—*Burns* v. *Smith*, 251.

EASEMENTS.

A right of way for a water main was given by deed containing a description of the route to be taken; subsequently the grantee sought to obtain a change in the route so that it might correspond to that contained in the deed previously drawn. This request was refused and had been refused before the delivery of the deed referred to; the president of the corporation grantor afterwards orally authorized the grantee to lay its water main along the line described in the rejected deed; the testimony did not show that the easement granted was abandoned, or that the right of way sought should be given and accepted in lieu of the one granted. *Held*, that the evidence would not sustain a finding of an agreement for the substitution of one right of way for the other.—*Great Falls W. W. Co.* v. *Ry. Co.*, 487.

An easement is an interest in land and cannot be created or granted except by deed or prescription.—*Id.*

A license to lay a water main over or through land may be given by parol—as no interest in the land is given; but the license may be revoked at any time, even after it has been executed and money expended in reliance thereon—the licensee, however, has a reasonable time after notice of revocation, within which to remove his property.—*Id.*

A license cannot ripen into an easement, as there cannot be an adverse possession by one in possession under a license.—*Id.*

Plaintiff applied to the superintendent of defendant's grantor for permission to lay a water main over the premises subsequently conveyed; he referred plaintiff to his superior officers, by whom the right was refused; plaintiff, however, laid its main, and thereafter defendant purchased the property. *Held*, that no easement had been created, and defendant was not estopped to deny that no easement had been granted. —*Id.*

Under a deed of a right to lay a water main from a pumping station, and "after crossing [a certain railroad branch] along the southerly line of the right of way of the said branch to Tenth avenue," the main should intersect the branch at the nearest point thereon from the pumping station.—*Id.*

ELECTIONS.

See CONSTITUTION—PLEADINGS.

EQUITY.

See DISTRICT COURT—PLEADINGS.

Where an equitable defense is interposed, the court has the power and jurisdiction of a chancellor, and may submit issues of fact to the jury, or may refuse to do so, and direct a verdict even where the evidence is conflicting.—*Sanford* v. *Gates, Townsend & Co.*, 277.

In suits brought for the purpose of obtaining equitable relief only, the court should determine *in limine* whether the facts stated are sufficient to warrant the invocation of the extraordinary powers, and the exercise of the peculiar jurisdiction, of chancery; and hence the court must decide whether the complaint states a cause of action cognizable in equity.—*Wilson* v. *Harris*, 374.

ESTOPPEL.

See MECHANICS' LIENS—PLEADING.

Where a plaintiff replied to an answer setting up an estoppel, and the case was tried on

the issues thus framed, he cannot, on appeal, depart from the lines within which he voluntarily confined himself by his pleadings below.—*Aikens* v. *Frank*, 192.

EVIDENCE.

See FRAUDULENT CONVEYANCES—LEASES—MINES AND MINING—PLEADING AND PRACTICE (Criminal)—REPLEVIN—SPECIFIC PERFORMANCE.

Plaintiff and intestate, Daniel Rash, were married in 1858. In 1864 the intestate left plaintiff and never lived with her thereafter. In 1872 plaintiff married one "H," and they lived together as man and wife thereafter. In 1894 the intestate and the defendant Berthena Rash intermarried and lived together as man and wife until the death of intestate. This action was brought by plaintiff to obtain a decree adjudging her to be the surviving widow of Daniel Rash, and as such to be entitled to share in the distribution of his estate. There was no evidence of any divorce dissolving the marriage relation existing between plaintiff and the deceased; although the complaint alleged that no such divorce had ever been granted, which was denied by the answer. *Held*, that, in the absence of any evidence to the contrary, the presumption is that the marriage between intestate and the defendant Berthena Rash was valid, and that the burden was on plaintiff to prove that no divorce had been granted.—*Hadley* v. *Rash*, 170.

The possession of personal property is *prima facie* evidence of ownership.—*Sweeney* v. *Darcy*, 188.

In an action between partners, the fact of partnership was not denied. *Held*, that oral testimony concerning the contents of missing letters, which was introduced for the sole purpose of proving the partnership, was not prejudicial to the rights of defendant.—*Emerson* v. *Bigler*, 200.

Evidence brought out on a proper cross-examination is part of the evidence given in chief for the party calling the witness.—*Wilson* v. *Harris*, 374.

EXECUTIONS.

See INJUNCTIONS.

FALSE PRETENSES.

See PLEADING AND PRACTICE (Criminal).

FALSE REPRESENTATIONS.

See CONTRACTS.

FINDINGS.

See EQUITY-PRACTICE.

FORGERY.

See PLEADING AND PRACTICE (Criminal).

FRAUD.

See FRAUDULENT CONVEYANCES—PLEADINGS.

FRAUDULENT CONVEYANCES.

See ATTACHMENTS.

Code of Civil Procedure (Compiled Statutes of 1887) Section 356, relating to supplemental proceedings, provides that, if it appear that a person having property of the debtor claims an adverse interest therein, the court may authorize the judgment creditor to sue to recover such interest, and may forbid a transfer thereof until an action can be commenced and prosecuted to judgment. *Held*, that the necessity of obtaining a

lien on property capable of manual delivery, in possession of an assignee under an assignment alleged to be in fraud of creditors, before suit to subject such property to the claims of creditors, is not obviated by an order of court in supplemental proceedings authorizing such suit, nor does the order protect the complaint in such suit from attack for want of equity, as construed by the rules applicable to similar suits not preceded by such order.—*Wilson* v. *Harris*, 374.

The burden of proving that a preference in a deed of assignment is fraudulent rests on the party so charging.—*Id.*

The mere fact that the relationship of parent and child exists between an assignor and a preferred creditor is not a badge of fraud.—*Id.*

In an action by creditors, attacking a sale by a mother to her daughter, proof that the mother was indebted to the daughter in a certain amount is not overcome by statements made by the mother's agent to mercantile agencies which made no specific mention of the indebtedness.—*Id.*

In a suit by creditors to have a sale of a stock of goods from a mother to her daugh er set aside, it is not sufficient evidence of fraud that a son, as agent for both parties, negotiated the sale, and was afterwards in the employ of the daughter.—*Id.*

An admission by an assignor, through her agent, that a sale was not *bona fide* made in a matter which was beyond the scope of the agent's authority, not relevant to any transaction then pending, and not referring to property in the agent's possession, should be excluded.—*Id.*

The good faith of an assignment for the benefit of creditors is not impeached by contradictory testimony as to acts and declarations of others subsequent to the assignment, and not participated in by the assignor.—*Id.*

written contract attended with every presumption of validity, will not be avoided on the ground of fraud, unless the proof thereof be clear and distinct.—*Id.*

GARNISHMENT.

See ATTACHMENT.

GUARDIAN.

Bond of, see PRINCIPAL AND SURETY.

HOMICIDE.

PLEADING AND PRACTICE (Criminal).

HUSBAND AND WIFE.

See EVIDENCE.

INFORMATION.

See PLEADING AND PRACTICE (Criminal).

INJUNCTIONS.

See CORPORATIONS—JUDGMENTS—MINES AND MINING—PLEADINGS.

Under Section 592 of the Code of Civil Procedure, one tenant in common of a mining claim is entitled to an injunction against his co-owners who are doing development upon the claim without his consent.—*Harrigan* v. *Lynch*, 36.

The decision of the lower court granting or refusing a preliminary injunction is a matter of discretion, and the order of the court below will not be reversed when the right to the injunction depends upon technical terms in a contract concerning the meaning of which the evidence is conflicting.—*Cambers* v. *Lowry*, 478.

Under Section 592, Code of Civil Procedure, which provides that if any person shall assume and exercise exclusive ownership over, or take away, any property held in tenancy in common, the party aggrieved shall have his action for the injury in the same

manner as if such tenancy in common did not exist, a tenant in common of a mining claim may enjoin his co-tenant from maintaining a tramway over the claim.—*Butte & Boston, etc., Co.* v. *Montana O. P. Co.*, 539.

Although the granting or refusing an interlocutory injunction is a matter within the discretion of the lower court, the appellate court will reverse an order where there has been an abuse of discretion.—*Id.*

Upon the hearing of an application for an injunction (or for dissolving an order granting an injunction) the plaintiff may use in support of his application affidavits and oral testimony.—*Id.*

Where a temporary restraining order was dissolved on insufficient evidence, the court, on appeal, will not direct the trial court to leave such order in force, but will order a new hearing.—*Id.*

On an appeal from an order granting an interlocutory injunction, the trial court will be presumed to have found all controverted facts necessary to support the order in favor of the prevailing party.—*Forrester* v. *B. & M. Min. Co.*, 565.

An order granting an interlocutory injunction will not be vacated on the ground that one of the plaintiffs is prohibited from bringing the action.—*Id.*

INSTRUCTIONS.

See PLEADING AND PRACTICE (Criminal).

Where it appears without any contradiction that the plaintiff was in possession of the property at the time it was taken by the defendant, it is error not to instruct the jury to that effect.—*Sweeny* v. *Darcy*, 188.

INTERPRETATION.

See CONSTITUTION—CONTRACTS—EASEMENTS—STATUTES.

JUDGMENTS.

See CONSTITUTION—PLEADING AND PRACTICE (Criminal)—PRINCIPAL AND SURETY—REPLEVIN.

Where a judgment debtor appeals from the judgment, and his appeal is dismissed because of his neglect to have the sureties on the undertaking on appeal justify within the time allowed by law, an injunction to prevent a sale of property under an execution issued upon the judgment is properly refused.—*Beck* v. *Fransham*, 117.

One court will not enjoin the enforcement of the execution issued upon a judgment of another court of concurrent jurisdiction, unless the latter court for lack of jurisdiction, cannot grant the relief desired.—*Id.*

The defendant cannot complain of a judgment because it is not for the full amount to which plaintiff is entitled.—*Town of White Sulphur Springs* v. *Pierce*, 130.

In an action of forcible entry and unlawful detainer, a judgment by default was taken and defendant moved to set aside the same. It appeared upon the motion that the action was commenced in the District Court and that the defendant retained attorneys to represent him and gave them the summons and complaint served upon him and also told them the date of service; it further appeared that the summons in such case is made returnable not less than four nor more than twelve days after the date of the summons; that the attorneys for defendant read the prayer of the complaint which was served with the summons, and from that concluded that the action was one of ejectment in which class of actions defendant would have 20 days within which to answer: *Held*, that an order setting aside the judgment by default was not an abuse of discretion, and would not be disturbed.—*Eakins* v. *Kemper*, 160.

Under Code of Civil Procedure (Compiled Statutes of 1887) Section 1, providing that there shall be but one form of civil action for the enforcement of private rights, a judgment may be revived by a civil action; and this, though Section 349 also authorizes an execution to issue after five years from the judgment, by leave of court.—*Haupt* v. *Burton*, 572.

A judgment for possession of land may be revived the same as a judgment in a personal

action, and the judgment as revived should be that plaintiff have execution, and be given possession as against defendants and their successors.—*Id.*

Compiled Statutes of 1887, Div. 1, Section 41, providing that an action on a judgment of any court of the United States or any state therein shall be commenced within six years, applies to judgments rendered by the courts of Montana.—*Id.*

Under Code of Civil Procedure (Compiled Statutes of 1887), Section 66, providing that civil actions are commenced by filing a complaint, a complaint to revive a judgment filed within six years confers jurisdiction, though the summons is not served within that time, notwithstanding, by Section 80, the court is deemed to have jurisdiction in a civil action from the service of summons.—*Id.*

The assignee of a judgment may sue to revive it, under the law requiring suits to be brought in the name of the real party in interest.—*Id.*

JURISDICTION.

See District Courts—Equity—Justices' Courts.

JURY.

See Pleading and Practice (Criminal).

JUSTICE'S COURT.

The docket of a justice of the peace must show affirmatively all the facts necessary to confer jurisdiction.—*State* v. *Laurandeau*, 216.

Under Section 1621, a justice of the peace cannot enter a judgment in favor of the plaintiff, where he fails to appear at the time specified in the summons or within one hour thereafter.—*Id.*

An appeal lies from a judgment entered in a justice's court upon failure of defendant to answer after the overruling of his demurrer to the complaint—the demurrer to the complaint raises a question of law, which is apparent upon the face of the papers. (Section 1761, Code of Civil Procedure.)—*Maxey* v. *Cooper*, 456.

JUSTIFICATION.

See Replevin.

LACHES.

See Corporations—Practice.

LARCENY.

See Pleading and Practice (Criminal).

LAWS.

Title of, See Constitution.

LEASE.

See Contracts—Railroads.

In the absence of fraud, accident or mistake, oral evidence will not be admitted to the effect that the lessor, at the time of making a written lease, or prior thereto, orally warranted the condition of the premises, or that he agreed to make repairs.—*York* v. *Steward*, 515.

In the lease of a house there is no implied warranty that the property is fitted for the use for which it is let or for any purpose, or that it will remain in a tenantable condition.—*Id.*

In an action to recover rent for premises leased to defendant, it is error to refuse evidence tending to show that the plumbing in a portion of the house which was in full

possession and control of plaintiff and was immediately over the room let to defendant, was defective; and that by reason thereof and of plaintiff's refusal to remedy the defect, water overflowed, ran down into the storeroom leased to defendant and deprived him of the use thereof; as the evidence tended to show a constructive eviction.—*Id.*

LEAVE TO SUE.

See PLEADING.

LICENSE.

See CONSTITUTION—CRIMINAL LAW—EASEMENTS.

LIENS.

See MECHANICS' LIENS.

MARRIAGE.

Presumption of, see EVIDENCE.

MECHANICS' LIENS.

A material man, as surety on the bond of a contractor, expressly contracted not to suffer liens to be placed against the owner's premises for work and material performed or furnished by the contractor, and that he would save the owner free and harmless against all loss, liens, etc. *Held*, that he was estopped to enforce a lien of his own for material furnished the contractor.—*Athens* v. *Frank*, 192.

And the fact that certain changes were made in the plans of the building does not alter the rule, where the building contract provides that such changes may be made.—*Id.*

In an action to foreclose a mechanic's lien, it was stipulated in the court below that the only question to be tried was as to whether the plaintiff furnished the material under any contract, express or implied, made with defendants or either of them, or with any person or agent having authority to make such contract on the part of the defendants, or either of them, with the plaintiff.—*Johnson* v. *Curtis*, 199.

There was a conflict of evidence upon this issue—which was tried to the court without a jury. *Held*, that the finding of the court below would not be reversed on appeal to the Supreme Court.—*Id.*

MINES AND MINING.

See COAL MINES—CONSTITUTION—CORPORATIONS—INJUNCTIONS—SPECIFIC PERFORMANCE—TOWNSITES.

In an action for trespass for cutting timber upon placer mining ground, plaintiff based his claim of ownership upon actual possession, and not by virtue of a location under the laws of the United States; defendants had not cut any timber from any portion of the claim actually occupied by plaintiff. *Held*, that a motion for non-suit was properly granted.—*Hamilton* v. *Huston*, 9.

Evidence which shows that the defendant was working a mining claim owned by him and plaintiffs as tenants in common, without their consent, that he carried on the work in his own manner, extracted and took away the ores, made his own arrangements for milling the ores, and applied the proceeds to the payment of obligations incurred by him in operating the mine, and that he intended to continue the work, sustain a finding that he was exercising exclusive ownership over the portion of the mine which he was working, and that he had taken away common property, under Section 592 of the Code of Civil Procedure.—*Harrigan* v. *Lynch*, 36.

Under Section 598 of the Code of Civil Procedure, which provides that "if any person shall assume and exercise exclusive ownership over, or take away, destroy, lessen in value, or otherwise injure or abuse any property held in joint tenancy, or tenancy in common, the party aggrieved shall have his action for the injury in the same manner as he would have it if such joint tenancy or tenancy in common did not exist,"

the fact that the work being done by the defendant tends to develop the claim, does not constitute a defense to an action brought to enjoin him for working the same, when he is assuming exclusive ownership over, or is taking away any of the common property.—*Id.*

MORTGAGES.

See CHATTEL MORTGAGES.

After having executed a mortgage upon certain real estate to a bank, the owner conveyed the property to "D," who mortgaged the same to "W," who, for a valuable consideration and before maturity, indorsed the note secured by this mortgage to plaintiff and also assigned the mortgage to him. Both "D" and "W" knew of the mortgage to the bank, when they acquired their interest in the property. The mortgage to the bank was not recorded until after the deed to "D" and the mortgage to "W" had been recorded, and the transfer of the note and mortgage to plaintiff had been made; the assignment of the mortgage to plaintiff was never recorded. *Held*, that the burden was upon the bank to prove that plaintiff had notice of its unrecorded mortgage.—*Hull* v. *Diehl*, 71.

Under the facts above stated; *Held*, that under the Compiled Statutes of 1887, plaintiff could not record the assignment of the mortgage to him, as a mortgage of real estate is not a conveyance; and that his failure so to do did not destroy his priority.—*Id.*

Held, further, that, granting that the assignment was entitled to record, the plaintiff being a purchaser for value and without notice of the mortgage first recorded, his right was prior to that of the bank, and that he was not bound by the actual notice of his assignor.—*Id.*

MUNICIPAL CORPORATIONS.

See TAXATION.

NAME.

PARTNERSHIP.

NEGOTIABLE PAPER.

A promissory note payable to the plaintiff was executed by the directors of a bank, including the president, to whom it was delivered for the purpose of borrowing money for the bank. The president used the note as collateral security for his own note to plaintiff, and the money thus borrowed was drawn by a check to the order of the cashier of the bank, which subsequently transferred the proceeds to the private use of the president. There was nothing on the face of the note to indicate for what purpose the note had been given. *Held*, that the plaintiff was not bound to ascertain for what purpose the note was given; and that the makers were liable.—*American Ex. Nat. Bank* v. *Ulm*, 440.

NEW TRIALS.

An issue of fact upon which a new trial can be granted is such an issue only as is raised by the pleadings; a statement on motion for new trial is confined to such issues; and a new trial of a motion is not authorized by the code. (Secs. 662, 1080, 1170, Code of Civil Procedure, construed.)—*Beach* v. *Spokane R. & W. Co.*, 7.

Waiver of objection to want of notice of intention to move for a new trial will be inferred from the action of plaintiff in offering amendments to the proposed statement or bill of exceptions to be used on hearing of the motion, without preserving an objection to the same because of the lack of such notice.—*Harrigan* v. *Lynch*, 36.

When the judge, or court, has allowed and settled a statement on motion for a new trial, unless the contrary appears in the record, the presumption is that service of the proposed statement was made, and that all requirements of the law for settlement of the same were had.—*Murray* v. *Hauser*, 120.

The defendant claimed that he moved for a non-suit at the close of plaintiff's testimony; that the motion was denied, and that defendant elected not to introduce testimony.

The defendant further claimed that the plaintiff thereafter introduced evidence, and that he (plaintiff) did not waive his right to introduce evidence after the case was thus reopened. This was contradicted by the referee's report and affidavits filed by the referee. *Held*, that the ruling of the court below to the effect that defendant had made his election would not be disturbed.—*Emerson* v. *Bigler*, 201.

Held, that defendant should have moved, when the report was filed, to have the case remanded to the referee to take further evidence.—*Id.*

N. B.—The Court criticizes the form of and matter contained in the statement on motion for new trial.—*Murray* v. *Hauser*, 120.

OFFICIAL BONDS.

See PRINCIPAL AND SURETY.

In an action against the sureties upon the bond of a treasurer, in which the answer admits that the treasurer during his term of office received all the moneys alleged in the complaint to have been received by him, it is not error to exclude testimony offered by the plaintiff for the purpose of showing the amount received by the treasurer from his predecessor.—*City of Great Falls* v. *Hanks*, 83.

The official bond of a city treasurer was conditioned for the faithful performance of his duties, and that when he should vacate the office, he would deliver to his successor all money and property belonging to the city held by him. *Held*, that his death during his term of office created a vacancy, but did not change his obligation; and that when the moneys were not paid over to his successor, the sureties on his bond were liable.—*Id.*

An action against the sureties upon an official bond of a treasurer, for a breach of the condition of the bond to the effect that the principal would turn over to his successor all moneys belonging to the city and received by him as treasurer, is an action upon a contract for the breach thereof.—*Id.*

The complaint in such an action sufficiently alleges the breach of the condition of the bond, when it states that during his term of office he received a specified sum of money belonging to the city and failed to pay any of the same over; and the further allegation to the effect that the treasurer converted the same to his own use does not change the nature of the action or prejudice the defendant.—*Id.*

ORAL EVIDENCE.

To modify contract, see LEASE.

ORDER.

See APPEALS.

ORDINANCE.

Pleadings, see PLEADING AND PRACTICE (Criminal).

OWNERSHIP.

See EVIDENCE.

PARTNERSHIP.

The plaintiffs, A. Guiterman, S. A. Guiterman and L. A. Guiterman, were doing business under the firm name of Guiterman Bros. *Held*, that this was not a fictitious name, or a designation not showing the persons interested as partners, within the meaning of Section 3280, Civil Code.—*Guiterman* v. *Wishon*, 458.

PAWNBROKER.

See CRIMINAL LAWS.

PLACER MINES.

See MINES AND MINING—TOWNSITES.

PLEADING.

See CERTIORARI—CORPORATIONS — FRAUD — OFFICIAL BONDS — PLEADING AND PRACTICE (Criminal)—PRACTICE.

The answer denied "every material allegation in the complaint." *Held*, that plaintiff not having objected at the trial, could not upon appeal question the sufficiency of the answer.—*Hamilton* v. *Huson*, 9.

Where a plaintiff admitted a bond pleaded by defendant, his denial of its plain and specific provisions is unavailing.—*Aikens* v. *Frank*, 192.

Plaintiff brought his action in tort for damages caused by failure of his co-tenants to keep a ditch in repair; defendants set up a contract whereby they agreed to keep the ditch in repair. *Held*, that plaintiff's action was one on contract; but that the defendants having set up the contract the breach of which was the cause of the damage to plaintiff, they had supplied the averments necessary to sustain a cause of action.—*Crowder* v. *McDonnell*, 367.

In a creditors' suit, when the question is as to a lien claimed by plaintiffs by virtue of garnishment proceedings, an averment that any moneys, goods and effects in possession of the garnishee have been attached, which omits to state that the garnishee had such property in his possession at the time of service is insufficient.—*Wilson* v. *Harris*, 374.

The complaint alleged that part payment had been made upon a certain named day; the answer denied that, on that day or at any other time since the 28th day of July, 1893, (the date of the purchase) the defendant paid the sum mentioned in the complaint or any other amount whatever, and averred that plaintiff had received no sum whatever from the defendant for any purpose. *Held*, that the answer denied the allegation of payment on account contained in the complaint.—*Gutterman* v. *Wishon*, 458.

In an application to enjoin a public officer from performing an official act affecting the people generally, the applicant need not show any special interest in the result.—*Buck* v. *Fitzgerald*, 482.

In an action brought to restrain the county clerk from so preparing the official ballots for an election as to include therein the question of the removal of a county seat, the complaint alleged that the persons who made the order under which the clerk was about to act were not the officers authorized so to do, and that in making the order they acted without the proper and necessary evidence before them. *Held*, that the allegations in the complaint are not inconsistent, and that the complaint is not ambiguous, unintelligible or uncertain.—*Id.*

A complaint in an action brought to restrain the execution of an order of county commissioners directing that the question of the removal of the county seat should be submitted to the electors, alleged that the commissioners refused to receive evidence as to the qualification of the signers of the petition on which the order was based, although proof was offered to show that a large number of the signers were not qualified. *Held*, that the allegation is insufficient in that it does not state that the evidence offered would prove or tend to show that the petition was not signed by the requisite number of electors.—*Id.*

In an action brought to restrain a county clerk from so preparing election ballots as to include therein the question of the removal of the county seat, the complaint alleged that three persons who made the order directing the clerk so to do were not county commissioners (the officials authorized to make such order), and had no right or claim to act as such, but that there were three other persons who held the office, and had duly qualified and assumed the duties thereof. *Held*, that the complaint stated facts sufficient to show that the order was made by those who were neither *de facto* nor *de jure* commissioners.—*Id.*

Under the Code of Civil Procedure of 1895, new matter set up in the answer as a defense, and not constituting a counterclaim, is deemed denied without a replication.—*Babcock* v. *Maxwell*, 589.

An answer, in an action of replevin, to the effect that the defendant took possession of

the chattels as the assignee of one who had been in possession thereof for a long time, that plaintiff knowingly allowed the defendant to sell the same, and that by reason thereof plaintiff was estopped from maintaining this, does not state a counterclaim as the same is defined in Section 691, Code of Civil Procedure.—*Id.*

A defendant, to entitle himself to a motion for judgment for want of a reply to a counterclaim. must plead it as such; and he is estopped from asserting that matter which in his answer he denominates "an equitable defense," is in fact a counterclaim.—*Id.*

One who has been appointed by the court the successor of an assignee of an insolvent, may be sued without leave of court.—*Id.*

An answer which merely alleges that the plaintiff falsely represented that a building which he was about to let to plaintiff was suitable for a particular purpose, does not assert a fraudulent misrepresentation or concealment.—*York* v. *Steward*, 515.

PLEADING AND PRACTICE (Criminal).

See also CRIMINAL LAW.

Under Section 8, Article 8 of the Constitution, and Section 1882, Penal Code, prosecution in the district court may either be by information, in cases where there has been an examination and commitment or admission to bail by magistrate, in which case an order of the court is not necessary; or by information filed by order of the court upon the written motion of the county attorney, which may be done without such examination.—*State* v. *Bowser*, 133.

Where the information is filed by leave of court, it need not be entered in writing before the filing of the information; but after the arrest of the defendant, the minutes of the court may be corrected so as to amend the order.—*Id.*

If the officials, whose duty it is to make up the jury list, purposely omit to put upon the jury list the names of persons competent and qualified to serve as trial jurors, a challenge should be sustained as to the whole panel. But the presumption is that the officials have done their duty and that the lists were properly made up, until the contrary is made to appear; and this presumption is not overcome by a mere offer of proof to the contrary not accompanied by an affidavit, and without calling a witness or asking leave to call one, and then tendering such proof.—*Id.*

In a prosecution for rape, it is not error to allow the state to show that the defendant is the father of the prosecuting witness.—*Id.*

In such an action, the prosecuting witness may testify as to her own age.—*Id.*

Where the witness upon direct examination is testifying concerning her age, it is not error to deny the request of defendant to interrogate her as to her knowledge of her age; defendant being allowed to make such investigation upon cross-examination.—*Id.*

Under Section 450, Penal Code, in a prosecution for rape, the question of force is immaterial where the prosecuting witness is under 16 years of age.—*Id.*

Upon the evidence in this case, it was held that the evidence showed the rape was committed by force.—*Id.*

It is not error to refuse an instruction requested by the defendant, when the court has already correctly and fully instructed the jury on the same subject.—*Id.*

The defendant was tried for the crime of robbery, the information charging that crime was committed by force; the court, having properly defined the crime, further charged the jury that it was incumbent upon the prosecution to prove that the property was taken by force. *Held*, that the omission of the word "feloniously" from this charge was not error, as the court had already fully instructed the jury upon that branch of the case.—*State* v. *Rodgers*, 143.

Under Section 2680 of the Penal Code, in a criminal proceeding for the violation of a city ordinance, it is sufficient to plead the ordinance by title, section and subdivision.—*City of Philipsburg* v. *Weinstein*, 146.

An information for robbery charged as follows (omitting unimportant matters): That the defendants on the 18th day of November, A. D. eighteen hundred and ninety-seven, with force and arms in and upon one "C. H.," then and there being, feloniously did make an assault, and the said "C. H." in bodily fear and danger of his life then and there feloniously did put, and (describing the property) of the goods and chattels of said "C. H."—then and there in the possession of the said "C. H.," from the immed-

late presence of the said "C. H." and against the will of the said "C. H.," by means of the fear aforesaid, did feloniously steal, take and carry away, with the intent then and there to deprive the said "C. H." thereof etc. *Held.* first, that the information states the time when the property was taken. Second, that the intent to deprive the owner of the property was sufficiently alleged. Third, that the information sufficiently charged the fear necessary to constitute the crime of robbery as defined in Section 891 of the Penal Code.—*State* v. *Gill*, 151.

An information charging the forgery of an endorsement of a certificate of deposit which was set out in full in the information and contained the words "H. D. & Co., Bankers" at the top and above the date and was signed "H. D. & Co." and was made payable to the order of the depositor, is sufficient, although no bank is referred to in the information, and there is no allegation therein of extrinsic facts to show that "H. D. & Co." had any bank in which the money was deposited. (Section 840, Penal Code).—*State* v. *Patch*, 534.

An information charging forgery of a certificate of deposit is not subject to demurrer because it alleges that the defendant forged and counterfeited the indorsement in the name of the payee therein with the intent to defraud him.—*Id.*

It is not necessary in an information for forging a certificate of deposit for the payment of \$60..........$\overline{100}$ Dollars, to allege extrinsic facts to show that it was a certificate of deposit for sixty dollars, where the exact sum deposited appears "\$60.00."—*Id.*

Section 3382 of the Code of Civil Procedure provides that a writing shown to and proved by a witness must be read to the jury before the testimony of the witness is closed: *Held*, that where it appears that a written instrument was testified to and was admitted in evidence, the presumption is, in the absence of evidence to the contrary, that the contents of the paper were read to the jury.—*Id.*

An instruction that it was the duty of accused to "exhaust all other reasonable means within his power consistent with his safety to prevent the homicide" before taking the life of deceased is erroneous, where there is evidence tending to show that the accused was murderously attacked by the deceased and his brother, near defendant's home.—*State* v. *Rolla*, 582.

An instruction that "the right to take life is limited to the apparent actual and present necessities then suddenly precipitated by the assailant, under such circumstances as then appear to the slayer, as a reasonable man, to place the life or person of the slayer in such peril as to admit of no other reasonable alternative than the killing of the assailant," is erroneous, in that it ignores the right of accused to act on what appeared to him at the time, as a reasonable man, necessary to save his own life, or prevent his receiving great bodily harm, although he was in no actual danger.—*Id.*

Where conflicting propositions of law are given to the jury on a material point, one correct, and the other incorrect, the error is fatal.—*Id.*

Penal Code, Section 2082, providing that "upon a trial for murder or manslaughter it is not necessary for the state to call as witnesses all persons who were shown to have been present at the homicide, but the court may require all of such witnesses to be sworn and examined," does not make it imperative that all such witnesses should always be introduced by the state, but authorizes the court to require it in its discretion.—*Id.*

Under Penal Code, Section 2082, authorizing the court to require all persons who are shown to have been present at a homicide to be called as witnesses by the state, a refusal to order such witnesses placed on the stand, where such refusal is an abuse of the court's discretion, is reversible error.—*Id.*

Where, after the refusal of the court to require the state to place on the stand certain eyewitnesses of the homicide, the witnesses in question were introduced and fully examined on defendant's behalf, and it is not claimed that the prosecuting attorney acted unfairly in the matter, such refusal by the court worked no prejudice to defendant.—*Id.*

In order to convict under Penal Code, Section 880, declaring guilty of larceny any person who, with intent to defraud the true owner of his property or to appropriate it to his own use, obtains from the possession of such owner, by false representation or pretenses, any money, it is necessary to prove that defendant obtained the money in question under circumstances showing that the owner parted with the title thereto, and not merely with the possession thereof.—*State* v. *Dickinson*, 595.

In an information under Penal Code, Section 880, defining larceny by false pretenses, it was alleged that defendant falsely and fraudulently represented that he was a certain physician named, the discoverer of a certain specified remedy, and the founder and a ent of the drug company by which it was manufactured and sold, and that by means of such pretenses he obtained from the possession of prosecutrix a certain sum of money, with intent, etc. Prosecutrix testified to the representations alleged, and also that she had been induced to call on defendant by means of his advertisement; that she believed in his abiltiy to cure, from what she had been told respecting the physician whom he represented himself to be; and that she paid him the money demanded, relying on his "guaranty," and believing that he would return the money, as agreed, if he failed to cure. *Held*, that the evidence proved that prosecutrix had voluntarily parted with the title to the money in question on the faith of the representations made to her by defendant.—*Id.*

Under an information charging defendant with larceny by obtaining money by means of false pretenses, it was error to instruct that if defendant obtained the "possession" of such money, with intent to feloniously convert it to his own use, in manner and form as charged, such act would amount to larceny, though prosecutrix knowingly and intentionally parted with the possession thereof, "provided she did not part with the title to the same," as such instruction authorized a conviction of larceny, under such information, even where there was a taking against the will of the owner, notwithstanding the requirements of Penal Code, Section 1832, that an information must contain a statement of the facts constituting the particular crime charged.—*Id.*

On a trial for larceny by false pretenses it was error to instruct that, in order to constitute the crime charged, it was necessary that the owner should part with the possession only of his property, relying on such false and fraudulent pretenses, and that "if the owner, under such circumstances, parts with both the title and possession of such property, th act will not constitute larceny, and will not sustain a verdict of guilty," as proof of the two ingredients mentioned was indispensable to a conviction under an information charging such crime.—*Id.*

A conviction which is contrary to the law as given in the instructions to the jury must be set aside, however erroneous the instructions may be.—*Id.*

Where an officer of a company for which defendant, who was on trial under a criminal charge, had represented himself to be an agent, testified that defendant was not such agent at the time alleged, it was error to refuse to permit him to prove by such witness, on cross-examination, that the company in question had, shortly before the time alleged, constituted as an agent a person who appeared to be one and the same person with defendant, acting under a different name.—*Id.*

POSSESSION.

See EVIDENCE—INSTRUCTIONS.

PRACTICE.

See ATTACHMENTS—EQUITY—INSTRUCTIONS—NEW TRIALS.

In an action at law to recover damages for the breach of a contract, after the case has been submitted to the jury which failed to agree upon a verdict, the court cannot make findings of fact and conclusions of law and base a judgment thereon; but should direct that the case be tried again, in accordance with the provisions of Section 269 of the Code of Civil Procedure.—*Murray* v. *Hauser*, 120.

An order cannot be based upon a stipulation between the attorneys in the case, where the stipulation is denied by one of the attorneys, and it was neither made in writing, nor made in open court and entered in the minutes. (Section 398, Code of Civil Procedure, and Rule 21, First District Court, construed).—*Beach* v. *Spokane R. & W. Co.*, 184.

It cannot be claimed that an order was based upon Section 774, Code of Civil Procedure, which provides for relief on the gronnd of mistake, inadvertance, surprise or excusable neglect, when the application for the order was not made for any such relief.—*Id.*

One who applies for the modification of an order within a reasonable time after he has received notice that the same has been made, is not guilty of *laches*.—*Id.*

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One who applies for the modification of an order within a reasonable time after he has received notice that the same has been made, is not guilty of *laches*.—*Id.*

The failure of a referee to file his report within ten days after the closing of testimony as provided in Section 1139 does not invalidate the report or the judgment rendered thereon: The section is not mandatory, but directory.—*Emerson* v. *Bigler*, 200

The referee found as facts in the case, that a partnership had existed between the plaintiffs and defendant and that the same was dissolved, as alleged in the complaint; that the defendant had sold part of the partnership property and the value thereof and that defendant had refused to account for the proceeds; and as conclusion of law, the referee found that plaintiffs were entitled to judgment: *Held*, that the findings were not inconsistent or defective, and that if the defendant was not satisfied with the same, he should have filed his exceptions.—*Id.*

The objections and exceptions taken by the respondent cannot be assigned as error.—*Buck* v. *Fitzgerald*, 482.

An application to amend a pleading during a trial is properly refused, when the amendment is not sought for the purpose of making the allegations correspond with evidence already introduced, and when no necessity for the amendment is shown.—*York* v. *Steward*, 515.

PRESUMPTIONS.

Of marriage, see EVIDENCE—Of regularity, see NEW TRIALS, AND PLEADING AND PRACTICE (Criminal.)

PRINCIPAL AND AGENT.

See AGENT.

PRINCIPAL AND SURETY.

The defendants were sureties upon a bond given by a guardian in compliance with an order authorizing him to sell real estate belonging to his ward; the order was recited in the bond which contained the condition that the guardian would "faithfully execute the duties of the trust according to law," instead of the condition provided for in Section 387. Probate Act of the Compiled Statutes, 1887. *Held*, that upon a misappropriation of the funds realized from a sale of real estate upon the order, the sureties were liable therefor.—*Botkin* v. *Kleinschmidt*, 1.

A judgment against a guardian declaring him to be indebted to the estate of his ward in a stated sum, being the moneys realized upon a sale of real estate made by him under an order of court, is binding upon the sureties on his bond given to secure the faithful performance by him of his trust.—*Id.*

In an action against the sureties on a guardian's bond, they cannot attack such a judgment collaterally, or claim that the interest allowed in the judgment is incorrect.—*Id.*

PROHIBITION.

The second section of the Act of 1897 (pp. 166-171) relating to the erection of the State Capitol Building, authorized the State Board to procure plans and specifications for the building, but did not limit the Board to plans, etc., prepared by citizens of the state. Section 3 of the Act, after providing that the Board should contract with the architect for compensation, contains the following: "That all architects, superintendents and contractors shall be citizens of the State of Montana." The law also authorizes the Board to "avail itself of the plans and specifications heretofore adopted for a State Capitol Building" if the same can be used, etc.

Held, that a petition which states that the Board had awarded the contract for furnishing plans and specifications to certain architects who were not residents of Montana, and had also entered into a contract with them to superintend the construction of the building, and were about to carry out these contracts, states facts sufficient to entitle the petitioner to a writ of prohibition. *Held*, further, that if the plans contracted for were modifications of the plans heretofore adopted for the State Capitol Building, or if the persons to whom the contract was awarded are citizens of the state these matters should be set up in an answer.—*State* v. *Smith*, 148.

PUBLIC LANDS.

See TOWNSITES, 1.

PUBLIC OFFICERS.

See CONSTITUTION—COUNTIES—PLEADING —PRINCIPAL AND SURETY.

PUBLIC PRINTING.

In an advertisement for bids for furnishing supplies for state officers, a detailed description of the goods was given; there were two bidders; as to some of the articles, the relator bid lower, and as to others his bid was higher than that of his competitor; the advertisement also provided that in case a greater quantity of any article should be needed than was specified, they should be delivered at the prices mentioned in the bid; the difference in the bids was exceedingly small, and it was impossible to tell the exact quantities which would be needed of those articles in regard to which the two bids differed. *Held*, that the evidence did not show that the state board had abused its discretion in determining which was the lowest responsible bid.—*State* v. *Smith*, 46.

RAILROADS.

One railroad company cannot lease its road to another company unless the legislature has given it power so to do.—*State* v. *Railway Co.*, 221.

Section 923 of the Civil Code (Act of March 4, 1893), which was continued in force after the adoption of the Code by Section 5186, Political Code, repeals Sections 911 and 912, so far as these latter sections limit the right of railroad companies to lease their roads to one another to such companies as are not parallel or competing roads.—*Id.*

Under Section 923 of the Civil Code, one railroad company can lease its road to a parallel and competing road for a term of ten years. Such a lease is not a consolidation of the two roads, within the meaning of Section 6, Article 15, of the State Constitution. *Id.*

Held, by a majority of the Court, that although two railroad companies have but one common terminus, nevertheless, when by traffic arrangement with other roads they are brought into competition between common terminal points, they are competing roads within the meaning of Section 6, Article 15, of the Constitution.—*Id.*

RAPE.

See PLEADING AND PRACTICE (Criminal).

RATIFICATION.

See CORPORATIONS.

RECEIVER.

An order appointing a receiver may be attacked collaterally, where it appears upon the face of the proceeding that the court did not have jurisdiction to grant the order.—*State* v. *District Court*, 155.

Where a court has made an order appointing a receiver, without jurisdiction so to do, a stranger to the proceeding cannot be punished for a contempt of court, for interfering with such order.—*Id.*

RECORDING.

See MORTGAGES.

REFEREE.

See NEW TRIALS—PRACTICE.

REFORMATION.

See CONTRACTS.

REPLEVIN.

In an action of replevin, the defendant sheriff attempted to justify under a writ of execution issued from a justice's court, but did not offer in evidence the judgment; the court instructed the jury to disregard all evidence offered to prove justification, but allowed the jury to take to the jury room and consider the summons, account and execution; to which action of the court the plaintiff objected. *Held*, error.—*Sweeney* v. *Darcy*, 189.

RESCISSION.

See CONTRACTS.

RES GESTAE.

See SPECIFIC PERFORMANCE.

RIGHT OF WAY.

See EASEMENTS.

ROBBERY.

See PLEADING AND PRACTICE (Criminal).

RULES OF COURT.

See APPEAL.

SALE.

See CONDITIONAL SALES.

SCHOOL DISTRICTS.

See CONSTITUTION.

SELF-DEFENSE.

See PLEADING AND PRACTICE (Criminal).

SHERIFF.

See ATTACHMENT—REPLEVIN.

SPECIFIC PERFORMANCE.

See DISTRICT COURT.

The lessees of a mine, who also had a bond for title to the same, assigned five-sevenths interest in the lease and bond to "O," upon the condition that he should carry out and perform the covenants of the lease and the condition of the bond; afterwards the lessees assigned the remaining two-sevenths of the lease and bond to the plaintiff, who then assigned one-third thereof to the defendants for $4,250, part of which was paid in cash, the remainder to be paid when the defendants could ascertain that the interest which they had bought was free and clear from all liens and incumbrances. "O" did all the work upon the claim required by the lease. *Held*, in an action to recover the remainder of the purchase price, that "O" had a lien upon plaintiff's interest in the property, and that defendants could recover the money which they had advanced to plaintiff as part of the purchase price for his interest.—*Beck* v. *O'Connor*, 109.

SUPPLEMENTAL PROCEEDINGS.

See FRAUDULENT CONVEYANCES.

SURETY.

See OFFICIAL BONDS—PRINCIPAL AND SURETY.

TAXATION.

See CONSTITUTION.

Under Sections 4860 and 4872 of the Political Code, a city or town council has power to levy taxes; and such taxes, when levied for street purposes, are not subject to the laws of 1887 providing that the taxpayers may work out street taxes if they so elect.—*Town of White Sulphur Springs* v *Pierce*, 130.

The county treasurer is authorized to collect the taxes of all towns and of all cities not of the first class, unless such cities or towns provide otherwise by ordinance. (Sec. 4870, Political Code.)—*Id.*

When the county treasurer has collected the taxes of a town and refuses to pay the amount collected to the town treasurer, as provided in Section 4864, the town may recover the amount so withheld.—*Id.*

State lands after sale, but before the price is fully paid, are subject to taxation as the property of the purchaser, notwithstanding Constitution, Article 12, Section 2, exempts the property of the state from taxation, and that the state retains the legal title as security for the deferred payments, since the purchaser is the owner, for the purpose of taxation, after he has entered into possession, paid a portion of the price, and contracted to pay the balance, as required by Political Code, Section 3480 *et seq.*—*Courtney* v. *Missoula Co.*, 591.

TENANTS IN COMMON.

See INJUNCTIONS—MINES AND MINING—WATER RIGHTS.

TERMS OF COURT.

See CONSTITUTION.

TITLE.

Of Bills, see CONSTITUTION.

TOWNSITE.

The plaintiff, who claimed title and right of possession to certain premises included within the limits of a patented townsite, a deed to which he had obtained from the probate judge, brought an action against defendant to quiet title to the same. Defendant claimed under a placer location existing at the date of the application for and entry of the townsite, but his right to which he did not assert at the time the application was made. It further appeared that for nearly twenty years defendant had allowed plaintiff to occupy the premises. *Held:* 1st. That the deed under the townsite patent was not void, and that, if voidable, defendant did not show any privity with the United States, and could not attack the townsite patent collaterally. 2nd. That the defendant had been guilty of laches and could not attack the plaintiff's title.—*Horsky* v. *Moran*, 345.

TRESPASS.

See MINES AND MINING.

ULTRA VIRES.

See CORPORATIONS.

WAIVER.

See CORPORATIONS—NEW TRIALS—PLEADINGS.

WARRANTY.

See LEASE.

WATER RIGHTS.

"M.," the predecessor in interest of the plaintiff, entered into an agreement with defendants, whereby he conveyed to them a right of way over his land for a ditch, became an owner in an interest in the ditch and water, and was not to pay any part of the expenses of keeping the ditch in repair. After "M." had conveyed his interest in the land, ditch and water, the defendants neglected to keep the ditch in repair, and thereby plaintiff suffered damage. *Held*, that plaintiff could not recover for damages caused by the negligent construction or location of the ditch; and that, being a tenant in common, he could not ordinarily recover damages from his co-tenants for their failure to repair the ditch; but that defendants having agreed to keep the ditch in repair, they were responsible for any damages caused by a breach of their contract. —*Crowder* v. *McDonnel*, 367.

The diversion of water for domestic purposes in excess of what is required, and allowing such excess to overflow lands without any intention of irrigating, and without any intention of using such excess for any useful purpose, does not constitute an appropriation of the excess.—*Power* v. *Switzer*, 523.

A lawful appropriation of water for a specified purpose gives the owner the right to change the use of his appropriation so long as it does not injure subsequent appropriators in their acquired rights —*Id.*

In an action to quiet title to the right to use the waters of a creek, where the decree awarded plaintiff a prior right to a certain amount of the water which it was found he had appropriated, he cannot complain of the indefiniteness of a further provision therein awarding defendant the right to the use of all the remaining waters of the creek to the amount "necessary" to the use of his manufactory.—*Id.*

The evidence examined and held to sustain a finding of an abandonment of a water right.—*Id.*